Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

CITY OF EDGERTON,
AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

[Caption Continued]

Joint Petition on Behalf of City of Edgerton and Edgerton Sand & Gravel, Inc. For Writ of Certiorari to the Supreme Court of the State of Wisconsin

JOINT PETITION ON BEHALF OF CITY OF EDGERTON AND EDGERTON SAND & GRAVEL, INC. FOR WRIT OF CERTIORARI AND APPENDIX TO PETITION

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10 pp

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES,
WAUSAU INSURANCE COMPANIES,
AND LOCAL GOVERNMENT PROPERTY
INSURANCE FUND,

Defendants.

QUESTION PRESENTED

DO MONIES PAID PURSUANT TO SECTIONS 107(a)(4)(A) AND 107(a)(4)(C) OF CERCLA CONSTITUTE DAMAGES AS CONSTRUED BY PRIOR DECISIONS OF THIS COURT AND PRIOR DECISIONS OF CIRCUIT COURTS OF APPEAL?

PARTIES IN THE PROCEEDING

This petition is filed by the City of Edgerton, a Wisconsin municipality, and Edgerton Sand & Gravel, Inc., a Wisconsin Corporation. The City of Edgerton and Edgerton Sand & Gravel, Inc. were plaintiffs in the complaint and were respondents before the Wisconsin Supreme Court.

The respondents are General Casualty Company of Wisconsin and Aetna Casualty & Surety Company. The respondents are insurance corporations named as defendants in the complaint and were appellants before the Wisconsin Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Edgerton and Edgerton Sand & Gravel, Inc. pray that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court in City of Edgerton, et al. v. General Casualty Company of Wisconsin, et al., Case No. 91-1408, entered on June 16, 1994. Petitioners seek review of the erroneous construction of substantive federal law by the Wisconsin Supreme Court. The issue is the construction of remedial provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), §§ 107(a)(4)(A) and (C), 42 U.S.C. §§ 9607(a)(4)(A) and (C).

The Wisconsin Supreme Court erred in construing § 107(a)(4)(A), which provides for the recovery of response costs as solely an "equitable remedy" and contrasted § 107(a)(4)(C), which provides for injuries to natural resources as a damages remedy. This is contrary to this Court's prior determinations in Key Tronic Corp. v. United States, __ U.S. __, 62 U.S.L.W. 4441, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (June 6, 1994) and Pennsylvania v. Union Gas Co., 491 U.S. 1, 7, 13, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989).

There is also a split among the federal circuits on whether response costs incurred pursuant to § 107(a)(4)(A) are legal damages or merely equitable relief. Compare Independent Petrochemical Co. v. Aetna Casualty & Surety Co., 944 F.2d 940 (D.C. Cir. 1991), cert. denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Co., ___ U.S. ___, 112 S. Ct. 1777, 118 L. Ed. 2d 435 (1992); Gerrish Corp. v. Universal Underwriters Ins. Corp., 947 F.2d 1023 (2d Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 2939, 119 L. Ed. 2d 864 (1992); Avondale Industries v. Travelers Indemnity Co., 887 F.2d 1200 (2d 1989), reh'g denied, 894 F.2d 498, cert.

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Review by this Court is necessary to correct the erroneous construction of substantive federal law by the Wisconsin Supreme Court and to resolve the substantial conflict among the various circuits as to whether response costs pursuant to § 107(a)(4)(A) are damages.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 184 Wis. 2d 750, 517 N.W.2d 463 (1994) and is reprinted in the Appendix at App. 101. The opinion of the Wisconsin Court of Appeals is reported at 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992) and is reprinted in the Appendix at App. 147. The unreported decision of the Circuit Court for Rock County dated May 10, 1991, is reprinted in the Appendix at App. 189.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered when the City's timely filed motion for reconsideration was denied on October 15, 1994. This Court has jurisdiction to review the judgment of the Wisconsin Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4) provides:

> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> > (A) all costs of removal or remedial action incurred by the United States or a State or an Indian tribe not inconsistent with the national contingency plan;
> >
> > ...
> >
> > (C) damages for injury to, destruction of or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; ...

Section 107(f)(1) of CERCLA, 42 U.S.C. § 9607(f)(1) provides:

> The measure of damages in any action under subparagraph (C) of subsection (a) [§ 9607(a)(4)(C)] shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage

assessment or restoration, rehabilitation, or acquisition for the same release of natural resources...

STATEMENT OF THE CASE

This case arises from a declaratory judgment action commenced in the Circuit Court for Rock County by the City of Edgerton (City) and Edgerton Sand & Gravel, Inc. (ES&G) against several insurers including General Casualty Company of Wisconsin (General Casualty) and Aetna Casualty & Surety Company (Aetna). The action was for a declaration of rights pursuant to various insurance policies concerning an action by the Wisconsin Department of Natural Resources (WDNR) requiring the City and ES&G to incur costs for responding to releases of hazardous substances. (R. 1.)

Edgerton Sand & Gravel, Inc. was the owner of the land on which the landfill was located. The landfill, known as the Edgerton Sand & Gravel Landfill, was used from the early 1950's until 1984 for waste disposal for local residents, municipalities and industries for waste disposal. (R. 38, ¶ 18.) Pursuant to Wis. Stat. § 66.049 and its predecessors, the City removed, collected and disposed of ashes, garbage and rubbish (solid waste). It provided this municipal service pursuant to state law by entering into agreements with the owner to dispose of such wastes at the landfill. (R. 38, ¶ 19.) The site was licensed and periodically inspected by the WDNR. (R. 63, ¶ 2.)

In 1984, groundwater contamination by volatile organic compounds (VOCs) was discovered beneath the landfill and in private drinking wells near the landfill. (App. at 107.) VOCs are a family of chemicals that are highly mobile in groundwater and readily evaporate in the atmosphere. Certain of the VOCs discovered in the

groundwater are known carcinogens and are hazardous substances defined by CERCLA. The movement of VOCs into the water supplies is continuous over time and as the VOC plume spreads, additional contamination of water supplies occurs. (R. 38, ¶ 9.) Unfortunately, problems with VOCs resulting from municipal landfills were largely unknown until the early 1980s. (R. 63, ¶ 2.)

Since groundwater drinking wells for property surrounding the landfill were contaminated with VOCs, WDNR included the landfill on the list of sites to be placed on EPA's list of highest priority cleanup sites. This list, known as CERCLIS, was established by CERCLA. Listing on the CERCLIS list makes the site eligible for the National Priorities List (NPL). Listing on the NPL triggers EPA's enforcement activities, including a federally supervised cleanup. A federally sponsored cleanup is considerably more expensive than a cleanup sponsored by private parties under supervision of the appropriate state regulatory agency. (R. 38, ¶ 13.)

On June 22, 1989, the EPA initiated its investigation of the landfill by a "Potentially Responsible Party" (PRP) letter which was sent to all potentially responsible parties (PRPs), including the City and ES&G. (R. 38, ¶ 14, exh. 1; R. 39, exh. B.) CERCLA defines a PRP to include current and former owners and operators of landfill facilities, waste generators, waste transporters and disposers. 42 U.S.C. § 9607(a). These letters demanded information concerning the operation of the landfill and chemicals deposited in the landfill. (R. 38, exh. 1.)

On November 6, 1989, the WDNR instructed ES&G to organize a group of PRPs to remediate the site. The City was a PRP. (R. 38 at ¶¶ 15, 16, 19.) Specifically, the WDNR demanded that ES&G and other PRPs present a "work plan" to remediate the landfill. (R. 38, ¶ 15, exh. 2.) On

February 27, 1990, WDNR demanded a "work plan" from the PRPs and stated it would begin legal action to require cleanup of the site and pursue cleanup as a federal Superfund site. (R. 38, ¶ 15, exh. 3.)

The WDNR established a deadline of May 31, 1991 for signing a contract with WDNR to clean up the site. In a letter dated February 8, 1991, shortly before the trial court's decision, the WDNR declared (R. 38, ¶ 21, exh. 4):

> WDNR intends to pursue listing of this site on the NPL unless potentially responsible parties (PRPs) for the site enter into a contract with WDNR to undertake investigation and clean-up activities. WDNR has developed a model contract for that purpose....
>
> The purpose of this letter is to notify you that unless a PRP group signs a contract with WDNR for this site by May 31, 1991, WDNR will request that this site be listed ont he (sic) NPL....
>
> In general, it has been WDNR's experience that work done under contract with WDNR goes much quicker, is less complex and less costly than work done on NPL sites. I would like to emphasize that this will be your only opportunity to join a PRP group for the purposes of entering into a contract with WDNR for work at this site. I would also like to reiterate that this contract is the only mechanism acceptable to WDNR for stopping pursuance of listing this site on the NPL.

The City and ES&G demanded that their insurers defend and indemnify them for responding as required by the WDNR. General Casualty and Aetna denied both a duty to defend and to indemnify pursuant to their policies. (R. 36,

exhs. B and E; R. 38, exhs. 5A-5P.) In part, the insurers relied upon the following language to deny coverage:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies...

(R. 36, exh. 5; R. 38, exhs. 5A-5P; emphasis added.) The City and ES&G commenced this action seeking a determination that the policies require the insurers to defend and indemnify it as to the cleanup of VOC contamination of the groundwater. Both the trial court and the Wisconsin Court of Appeals determined that the insurers had a duty to defend and that the term "damages" included Superfund response costs. (App. at 112.)

The Wisconsin Supreme Court, however, determined that response costs pursuant to § 107(a)(4)(A) were by definition equitable relief and reflected a congressional intent to differentiate between response costs and damages to natural resources. The court reasoned:

> Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C).

(App. at 137.) The court further cited federal administrative regulations in support of its position. (App. at 137.) Essentially, the court relied upon a distinction between liability for response costs pursuant to subsection A and for natural resources injuries pursuant to subsection C. Thus, the court based its decision on an erroneous construction of the substantive federal law and remedies available pursuant to CERCLA. (Id.)

The City and ES&G filed a timely motion for reconsideration which was denied by the Wisconsin Supreme Court without opinion on October 25, 1994. (App. at 195.) Petitioners now seek review in this Court of the decision of the Wisconsin Supreme Court dismissing their complaint based upon an erroneous construction of CERCLA.

REASONS FOR GRANTING THE PETITION

I. THE WISCONSIN SUPREME COURT'S DECISION THAT THE CERCLA RESPONSE COSTS ARE NOT DAMAGES IS CONTRARY TO THE STATUTORY LANGUAGE AND DECISIONS OF THIS COURT.

An important consideration for granting review is when a state court had decided an important question of federal law in a way that conflicts with decisions of this Court. Supreme Court Rule 10.1(c). The Wisconsin Supreme Court has decided that response costs awarded pursuant to § 9607(a)(4)(A) are not damages, but costs awarded pursuant to § 9607(a)(4)(C) are damages. This conflicts with both the statutory language and applicable decisions of this Court in Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989) and Key Tronic Corp. v. United States, __ U.S. __, 62 U.S.L.W. 4441, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (June 6, 1994).

A review of the statutory language of CERCLA demonstrates that there is no distinction drawn between response costs and damages. One of the requirements imposing liability pursuant to CERCLA is "a release or a threatened release which causes the incurrence of response costs..." § 9607(a)(4). This is a requirement regardless of whether the ultimate action seeks relief pursuant to subsection A for cleanup or subsection C for natural resources, or both. Moreover, the measure of natural resources damages, which the Wisconsin Supreme Court declared were damages, includes cleanup costs. § 9607(f)(1); 43 CFR § 11.80(b), 59 Fed. Reg. 14262, 14283.

The statutory language of CERCLA expressly defines natural resources damages to include cleanup costs. 42 U.S.C. § 9607(f)(1) provides:

> The measure of damages in any action under subparagraph (C) of subsection (a) [§ 9607(a)(4)(C)] shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release of natural resources...

While precluding double recovery, the language clearly includes cleanup costs as part of natural resources damages recovery pursuant to subsection C.

Thus, the Wisconsin Supreme Court drew a distinction, where none exists, between response costs pursuant to subsection A as opposed to injuries to natural resources pursuant to subsection C which is nonexistent in federal law. The statute requires "response costs" to trigger any remedy, whether it be pursuant to subsection A or C, and measures damages under subsection C to include costs which would be incurred under subsection A.

This Court previously considered whether response costs constitute damages in Union Gas Co. In Union Gas Co., the United States brought an action for recovery of its response and cleanup costs pursuant to §§ 104 and 106 of CERCLA against the operator of a coal gasification plant. The action was for the cleanup of a hazardous waste spill for the operator's former facility. The operator filed a third-party complaint against the State of Pennsylvania alleging that its flood control efforts had negligently caused or contributed to the spill. Union Gas Co., 491 U.S. at 5-6.

The third-party complaint was dismissed by the trial court and the dismissal affirmed by the court of appeals on

the ground that there was no clear expression of Congressional intent to hold states liable for monetary damages pursuant to CERCLA as required by the Eleventh Amendment. Id. This Court initially remanded the matter to the lower courts for reconsideration in light of the 1986 amendments to CERCLA (SARA) and the court of appeals did, on remand, hold that the states were liable for monetary damages pursuant to CERCLA as amended.

This Court then granted certiorari to decide "whether CERCLA, as amended by SARA, clearly expresses an intent to hold states liable in damages for conduct described in the statute." Union Gas Co., 491 U.S. at 7 (emphasis added). In considering the State's claim of immunity pursuant to the Eleventh Amendment, the Supreme Court noted:

> CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. §§ 9604, 9606 (1982 ed. and Supp. IV), and imposes the costs of the cleanup on those responsible for contamination, § 9607.

Id. This Court concluded:

> We thus hold that the language of CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court.

Union Gas Co., 491 U.S. at 13 (emphasis added; footnote omitted).

The issue squarely decided in Union Gas Co. was whether an action against a State for response costs pursuant to § 9607(a)(4)(A) was an action for damages in violation of the Eleventh Amendment. The Supreme Court decision itself does state that the underlying case was for response costs already expended in the amount of $720,000 for cleanup and

the lower court opinions clearly confirm this fact. Union Gas Co., 491 U.S. at 5-6; United States v. Union Gas Co., 792 F.2d 372, 374-75 (3rd Cir. 1986) vacated, 479 U.S. 1025, 107 S. Ct. 865, 93 L. Ed. 2d 821 (1987). Indeed, in distinguishing cases involving other statutes, the court of appeals noted:

> [T]he citizen suit provisions in the other three statutes [not CERCLA] are fundamentally different from § 9607, for whereas those provisions permit only injunctive relief to enforce the terms of each statute, § 9607 permits recoupment of clean-up expenses, an action for damages.

Union Gas Co., 792 F.2d at 382 (emphasis added). It was against this backdrop that the Supreme Court declared that the action in question was for damages, found congressional intent to override Eleventh Amendment immunity and determined that Congress had the power pursuant to the Commerce Clause.

Similarly, in Key Tronic, 62 U.S.L.W. at 4443, this Court held that PRPs have an implied private right of action against other PRPs for response costs pursuant to § 9607. This implied private right of action was recognized prior to the 1986 amendments. Key Tronic, 62 U.S.L.W. at 4443, n.7. In addition, as part of the 1986 amendments, Congress expressly created a private action for contribution pursuant to § 9613(f). Id. The Key Tronic Court held that while there is a right to contribution, that right does not extend to litigation-related fees and expenses. The Key Tronic decision treats response costs as damages by recognizing an implied right of contribution for response costs which Congress made explicit by amendment in 1986. However, consistent with the American rule, attorneys fees were not part of damages and not part of the right to contribution.

In deciding response costs were not damages, the Wisconsin Supreme Court failed to consider the substantial distinction between the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). Historically, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., was enacted in 1976 as an amendment to the Solid Waste Disposal Act. RCRA, as amended in 1980 and 1984, provided for tracking, handling, storing and disposal of hazardous wastes. In 1980, Congress enacted CERCLA due to concerns that serious gaps existed as to abandoned or dormant sites which were causing environmental damage.

Two principal concerns motivated Congress in adopting CERCLA. First, Congress intended to provide the government with all of the tools necessary for prompt, adequate and appropriate remedies for releases of hazardous substances. Second, Congress sought to require the parties who created or otherwise contributed to the disposal of the hazardous substances to pay for the costs of cleanup as opposed to the taxpayers. Schraff and Steinberg, RCRA and Superfund, para. 1.01 (Shepard's/McGraw-Hill, Inc. 1993).

Section 9607(a)(4) generally establishes liability for the costs of responding to and remedying the release of hazardous substances. Schraff & Steinberg point out with reference to the liability imposed at para. 1.08[2]:

> Two observations are pertinent about the categories of response costs for which a party is liable under Section 107. First, CERCLA includes extremely broad definitions of "removal" and "remedial" action, as well as "response." As a consequence, once liability is established, it is relatively easy for the federal government to impose upon a responsible party

> virtually any cost associated with the clean-up of a release of hazardous substances. Second, private parties may recover their response costs from a responsible party under Section 107.

The fundamental policy underlying CERCLA liability was to achieve fast and efficient remediation of environmental damage at minimal cost to taxpayers.

To effectuate this fundamental policy, as this Court's decisions in both Union Gas and Key Tronic recognize, Congress enacted § 9607(a)(4) to insure that all costs of responding to the release of hazardous substances are covered by those responsible for the release. In essence, Congress defined "damages" in the context of environmental clean-up to include all response costs, regardless of whether these costs were greater than the diminution of market value caused by the release.

The administrative regulations provide that the measure of damages are the costs of restoration of the natural resources. The regulations provide in relevant part:

> The purpose of the Damage Determination phase is to establish the amount of money to be sought in compensation for injuries to natural resources resulting from a discharge of oil or release of a hazardous substance. The measure of damages is the cost of restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources and the services those resources provide.

43 CFR § 11.80(b), 59 Fed. Reg. at 14283 (emphasis added).

This is consistent with the decision of the Court of Appeals for the District of Columbia in Ohio v. United States Dep't of Interior, 880 F.2d 432, 441-59 (D.C. Cir. 1989). The court ordered the Department of the Interior "to revise its regulations to reflect the statutory preference for using restoration costs as a measure of damages." Final Rule for 43 CFR Part 11, 59 Fed. Reg. 14262, 14270-71.

The decision of the Wisconsin Supreme Court significantly thwarts the policy of rapid and efficient remediation by private parties. The goal of avoiding substantial numbers of individual common law claims by hundreds of PRPs with attendant expenses and delays is thwarted where that is the only means to obtain insurance coverage. As the Wisconsin Supreme Court acknowledged, Congress expressly contemplated that insurance coverage would be available to assist PRPs in paying for cleanup costs. City of Edgerton, 184 Wis. 2d at 785-86 (App. at 138) citing 42 U.S.C. § 9607(e)(1). In many instances, insurance coverage is a major means for bearing the burden of remediation of environmental contamination by small businesses and municipalities. Denial of insurance coverage for CERCLA response costs renders CERCLA largely ineffective.

The decision of the Wisconsin Supreme Court construes CERCLA in a manner inconsistent with the statutory language, regulations and prior decisions of this Court. Furthermore, the decision substantially undercuts the efficacy of CERCLA in promoting rapid and efficient remediation. Therefore, review of the decision by this Court is warranted and the petition for writ of certiorari should be granted.

II. THERE IS A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS AND STATE COURTS OF LAST RESORT AS TO WHETHER CERCLA RESPONSE COSTS CONSTITUTE DAMAGES.

Rule 10.1(b) provides that an important consideration supporting review by this Court is a conflict between the circuits or between courts of last resort on a federal question. There is a significant split between both federal circuit courts of appeals and state courts of last resort on the issue of whether CERCLA response costs constitute damages. The spilt of the decisions of the courts of appeals is shown by the previously cited cases. Compare Independent Petrochemical Co., 944 F.2d 940; Gerrish Corp., 947 F.2d 1023; Avondale Industries, 887 F.2d 1200; Port of Portland, 796 F.2d 1888 with Cincinnati Insurance Co., 857 F.2d 979; Maryland Casualty Co., 822 F.2d 1348; Continental Insurance Co., 842 F.2d 977; Grisham v. Commercial Union Insurance, 951 F.2d 872; A. Johnson, 933 F.2d 66. The state court decisions are collected in Minnesota Mining & Manufacturing Co. v. Travelers Indemnity Co., 457 N.W.2d 175, 180-81 n.6 (Minn. 1990) and A.Y. McDonald Industries v. Insurance Company of North America, 475 N.W.2d 607, 622-26 (Ia. 1991). Wisconsin and Maine are the only state courts of last resort to date to hold that CERCLA response costs are not covered by insurance policies.

Ordinarily, the applicability of insurance policies is a matter of state law contract interpretation. Here, however, the issue is the appropriate construction of substantive remedies available pursuant to federal law. Moreover, the construction of federal law in this case substantially impacts on those very federal policies underlying the adoption of CERCLA.

The issue is not merely whether response costs are characterized as an equitable or legal form of relief. The Wisconsin Supreme Court had previously emphasized in

School District of Shorewood v. Wausau Insurance Companies, 170 Wis. 2d 347, 369, 488 N.W.2d 82 (1992), reh'g denied, 174 Wis. 2d 726, 498 N.W.2d 823 (1993) (costs of complying with an injunctive decree ordering desegregation of school system not covered). Rather, the Wisconsin Supreme Court characterized response costs pursuant to CERCLA as injunctive relief distinct from compensatory relief. The court reasoned:

> Therefore, as an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of injunctive action, while provided for remediation and cleanup of the affected site. This type of relief is distinct from that which is substitutionary--monetary compensation provided to make up for a claimed loss.

City of Edgerton, 184 Wis. 2d at 785 (App. at 137).

As previously noted, the characterization of CERCLA response costs as a unique form of relief for which there is no insurance coverage substantially hinders CERCLA's ability to accomplish its objectives. More importantly, the conflict between various states and various courts of appeals, in and of itself, causes a significant difficulty in the cleanup of various sites. Depending on the characterization of CERCLA response costs by a particular state or circuit court, there may or may not be insurance coverage. This means there may be coverage for all PRPs at some sites, certain PRPs at other sites, but no PRPs as to other sites, depending on the location of the site, the location of the PRP or the location of the insurance company. This creates tremendous uncertainty, confusion and inconsistency.

To effectuate CERCLA, it is necessary to have a uniform, consistent treatment of response costs. To allow states to construe federal law to deny access to available funds for cleanup by virtue of mischaracterization of CERCLA remedies interferes with the statute's ability to accomplish its objectives of a rapid and efficient cleanup of environmental contamination. Accordingly, this Court should grant the petition for the writ of certiorari to review the decision by the Wisconsin Supreme Court.

CONCLUSION

Petitioners respectfully request the writ of certiorari be granted to review and resolve the conflict between the Wisconsin Supreme Court and this Court, other federal circuit courts of appeals, and state courts of last resort on an important question of federal law concerning the appropriate nature of response costs pursuant to CERCLA.

Respectfully submitted,

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APPENDIX TO PETITION

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STATE OF WISCONSIN : IN SUPREME COURT

No. 91-1408

City of Edgerton and
Edgerton Sand & Gravel, Inc.,

Plaintiffs-Respondents,

v.

General Casualty Company
of Wisconsin,

Defendant-Appellant-Petitioner,

Wisconsin Insurance Security Fund,

Defendant,

Aetna Casualty and Surety Company,

Defendant-Co-Appellant-Petitioner,

Hanover Insurance Companies,
Wausau Insurance Companies and
Local Government Property Insurance Fund,

Defendants.

REVIEW of a decision of the Court of Appeals. *Affirmed in part, reversed in part, and remanded.*

Filed June 16, 1994.

JANINE P. GESKE, J. This is a review of a published decision of the court of appeals, *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), which affirmed in part and reversed in part a judgment of the circuit court for Rock County, John H. Lussow, Circuit Judge. The circuit court granted summary judgment to the plaintiffs, City of Edgerton (the City) and Edgerton Sand and Gravel, Inc. (ES&G). The City and ES&G sought a declaration of their rights under insurance policies issued by General Casualty Company of Wisconsin (General Casualty) and Aetna Casualty and Surety Company (Aetna).[1] The City and ES&G claimed that the policies provided coverage for environmental remediation costs resulting from the operation of a landfill located in the City.

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[1]Both the City and ES&G maintained insurance policies for personal injury liability from approximately 1973 to 1986. Specifically, ES&G received primary coverage from Iowa National Mutual Insurance Co. for the period of January, 1973 to January, 1984 (Iowa National is now insolvent). Primary coverage from January, 1984 to January, 1986 was provided by General Casualty. ES&G also maintained an excess coverage policy, issued by Aetna, from April, 1974 to April, 1977.

Iowa National also issued a primary coverage policy to the City for April, 1977 to April, 1981. That coverage was then carried by General Casualty from April, 1982 to April, 1986. Aetna did not issue a policy to the City at any time.

Both ES&G and the City agree that General Casualty's policies commencing *after* 1984 do not provide coverage.

The circuit court agreed and granted the motion for summary judgment. The court of appeals reversed that decision.

General Casualty and Aetna filed cross-motions for summary judgment in the circuit court, claiming that (a) no suit seeking damages had been filed which would trigger a duty to defend, and (b) the failure of ES&G to provide notice of an occurrence or claim precluded coverage. The circuit court denied the cross-motions, and the court of appeals affirmed.

We now affirm the court of appeals decision with regard to the City's and ES&G's motion for summary judgment and reverse the court of appeals decision with regard to General Casualty's and Aetna's cross-motions for summary judgment.

Of paramount concern in this case is whether the insurance policies for which ES&G and the City contracted require a duty to defend against federal and state agencies' demands for environmental cleanup. Consequently, the following issues of first impression are before the court:

(1) Does the receipt of certain letters from a governmental agency requesting voluntary participation in environmental cleanup efforts constitute a "suit seeking damages" sufficient to trigger an insurance company's duty to defend?

(2) Do cleanup and remediation costs under CERCLA[2] and equivalent state statutes[3] constitute "damages" within the context of a comprehensive liability insurance policy?

(3) Do the personal injury provisions of an insurance policy provide coverage for environmental cleanup

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[2]CERCLA, or the Comprehensive Environmental Response, Compensation and Liability Act of 1980, is also known as "Superfund" and was designed to provide for the cleanup of hazardous waste. The act empowered the federal government, through the Environmental Protection Agency (EPA), to identify hazardous waste sites and pursue remedial activities. As part of the remedial process, the government may perform the cleanup and seek compensation from responsible parties or require the polluters to do the cleanup.

Following the implementation of CERCLA in 1980, state legislatures enacted similar legislation which would apply to hazardous waste identified under the federal program, as well as reach to other substances that individual states had the need to control. *See* Howell A. Burkhalter, Comment, *Liability for CERCLA Cleanup Costs--Are Insurers the Victims of Judicial Activism?*, 26 Wake Forest L. Rev. 221, 222 n.8 (1991).

CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) and is codified at 42 U.S.C. secs. 9601-9675 (1988 & Supp. 1992). This amendment served to buttress the original legislation.

Throughout this opinion, CERCLA will be cited as 42 U.S.C. sec. _____.

[3]Sections 144.43 to 144.79, Stats., comprise subch. IV of ch. 144 and focus upon solid waste, hazardous waste, and refuse. Specifically, secs. 144.442 and 144.443 establish the process for environmental repair and the financial responsibility associated with it. Various sections within this subchapter will be referred to in pertinent part throughout this opinion.

costs when there has been no allegation of wrongful entry, eviction, or other invasion of the right to private occupancy?

(4) Is the "insured's own property" exclusion applicable so as to preclude coverage for cleanup and response costs incurred to remediate the insured's own property?

The threshold question in this case is whether the receipt by ES&G and the City of letters by the Wisconsin Department of Natural Resources (DNR), requesting remediation of a contaminated site, triggered General Casualty's and Aetna's duty to defend the City and ES&G as their insureds. The court of appeals concluded that the duty to defend arose when a federal or state environmental agency identified a potentially responsible party (PRP)[4] which it

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[4]42 U.S.C. sec 9622(e)(1) provides in pertinent part:

> Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 9604(b) of this title) and would expedite remedial action, the President shall so notify all such parties....

Once a PRP is notified of its status under this section, it has three options: (1) do nothing and wait for the government to recover the costs of the cleanup; (2) clean up the affected site or join with other PRPs to effect a cleanup; or (3) litigate with the government so as to possibly secure a more favorable future result. *See* Joanna L. Johnson, Comment, *Whether Insurers Must Defend PRP Notifications: An Expensive Issue Complicated by Conflicting Court Decisions*, 10 N. Ill. U.L. Rev. 579, 581 n.8 (1990) [hereinafter *Whether Insurers Must Defend].*

unequivocally required to pay the cost of, or participate in paying the cost of, landfill remediation. *Edgerton*, 172 Wis. 2d at 530. However, the duty to defend is not triggered unless the suit seeks damages. *Id.* (citing *Shorewood School Dist. v. Wausau Ins.*, 170 Wis. 2d 347, 366, 488 N.W.2d 82 (1992)). Damages, according to the court of appeals, are remedial in nature, not preventive, and therefore do not encompass the cost of complying with an injunctive decree. *See Shorewood School Dist.*, 170 Wis. 2d at 370. Though General Casualty and Aetna argued that Superfund remediation and cleanup costs were incurred in response to claims for injunctive relief, the court of appeals concluded that the manner in which the term "damages" was used in the insurance policies at issue contemplated costs incurred when responding to the Superfund initiative.

We now hold that the DNR's notification to ES&G and the City by letter that ES&G and the City were potentially responsible parties and liable for hazardous waste site remediation costs does not trigger the insurers' duty to defend because the letters do not constitute a "suit seeking damages" within the plain meaning of the insurance policies contracted for and issued to ES&G and the City.

This holding makes it unnecessary for us to further analyze the personal injury and pollution exclusion provisions of the policies at issue.

The relevant facts are as follows. ES&G owns a landfill site in Rock County, consisting of approximately ten

acres.[5] The site, located on the southern border of the City, accommodated sand and gravel operations as well as serving the City's landfill from 1968 to 1984.

By 1978, the DNR informed ES&G by letter that it suspected groundwater contamination at the site. The DNR recommended that the landfill be closed and capped. In 1984, volatile organic compounds (VOCs) were detected in the groundwater under and in the vicinity of the site. ES&G closed the landfill on December 30, 1984, and, during the next year, the site was capped.[6] Though the site was closed, groundwater contamination remained, and the DNR recommended the landfill for placement on the EPA's list of contaminated sites for priority cleanup.

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[5]The site of the landfill was owned by the Sweeney family (owners of ES&G). From the early 1950's until the time of its closing in December of 1984, the landfill was used as a dump and burn site for waste materials. From 1968 to 1984, the City of Edgerton leased the site for landfill operations. Licensing information indicates that the site was to be a depository for municipal waste, not hazardous or industrial wastes. However, ES&G and the City have claimed that sludge from the City's water treatment plant was also dumped at the site.

[6]"Capping" of the landfill required the construction of a clay cap, consisting of approximately two and one-half feet of clay material, over which was deposited six inches of topsoil. Ground cover was planted over the cap to ensure soil stability. Construction of the clay cap was done with DNR approval.

On June 22, 1989, the EPA notified ES&G and the City by certified letter[7] that the EPA was investigating the circumstances surrounding the presence of hazardous substances in and around the landfill.[8] The EPA then requested that ES&G and the City (now considered PRPs) respond to the DNR's request for information regarding the disposal of hazardous substances at the landfill from 1950 to 1984.

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[7]The letter from the EPA stated the following in pertinent part:

> The United States Environmental Protection Agency (U.S. EPA) is presently investigating the circumstances surrounding the presence of hazardous substances in and around the Edgerton Sand & Gravel Site in Rock County....
>
> Pursuant to the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. [sec.] 9604(e), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 [SARA], and pursuant to Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. [sec.] 76927, you are hereby requested to respond to the following Information Requests. Compliance with the following Information Requests is mandatory....

The information requests focused upon the City's and ES&G's possession, custody or control relating to the operation/cleanup of the landfill and to the storage and/or disposal of hazardous substances at the site.

[8]This course of action by the EPA was pursuant to 42 U.S.C. sec. 9604(e).

In July, 1989, both the City and ES&G forwarded the letters received from the EPA to their primary carrier, General Casualty. Each separately requested defense coverage. ES&G specifically requested that General Casualty pay any costs which ES&G may have incurred regarding the site.

In February, 1990, the DNR sent certified letters to the City and ES&G, giving each 30 days to propose a plan for remediation of the site and any problems associated with it.[9]

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[9]In its letter, the DNR stated that the remediation plan must comprehensively describe the actions required to determine the extent of the contamination and to remediate it in accordance with state regulations. The plan must also follow the guidelines established by the EPA.

Section 144.442, Stats., outlines actions to be taken regarding environmental repair. Section 144.442(8) specifically articulates how the Superfund act shall be implemented in the state:

> (8) IMPLEMENTING THE FEDERAL SUPERFUND ACT. (a) The department [of natural resources] may advise, consult, assist and contract with other interested persons to take action to implement the federal comprehensive environmental response, compensation and liability act of 1980, 42 USC 9601, et seq., in cooperation with the federal environmental protection agency. These actions include all of the actions under subs. (4) to (6). The department may enter into agreements with the federal environmental protection agency.
>
> (b) The department may expend moneys from the appropriations under ss. 20.370(2)(dv) and 20.866(2)(tg) as required under 42 USC 9601, et seq. The department shall promulgate by rule criteria for the expenditure of moneys from the appropriations under ss.

20.370(2)(dv) and 20.866(2)(tg), the moneys available from other sources for the required sharing of costs, the differences between public and private sites or facilities, the potential for cost recovery from responsible parties and any other appropriate factors.

(c) 1. The department may require a municipality to pay a reasonable share of the amount expended by the department for a project under par. (b). The department shall base any share charged to a municipality for a project under par. (b) on the following factors:

a. The municipality's responsibility for the site or facility affected by the project.

b. The benefit that the municipality receives from the project.

c. The municipality's ability to pay for the project.

2. The total amount charged to all municipalities who are charged for the project may not exceed 50% of the amount expended by the department under par. (b) for the project.

3. The department shall promulgate rules establishing criteria for determining the responsibility, for the purposes of this subsection, of a municipality for a site or facility affected by the project under par. (b); the benefit a municipality receives from a project under par. (b); and the ability of a municipality to pay for a project under par. (b).

4. All monies received under this paragraph shall be credited to the environmental fund for

Failure to respond would result in the listing of the site on CERCLA's National Priorities List (NPL) or state action.[10] By April, 1990, ES&G notified Aetna, its excess insurer, of the receipt of the EPA information request letter and the DNR enforcement letter. Again, ES&G requested coverage of defense costs as well as any liability resulting from EPA or DNR claims. General Casualty denied coverage and a defense for the City and ES&G. Aetna denied the same for ES&G.

Both the City and ES&G, in a declaratory action begun in December, 1990, sought to define the obligations of General Casualty and Aetna under the insurance policies. Specifically, both the City and ES&G claimed that General Casualty and Aetna were obligated to defend and indemnify them for any liability arising out of DNR or EPA claims, actions, or suits involving the landfill. Additionally, ES&G and the City stated a claim for bad faith against General Casualty and Aetna for refusing to provide a defense. A motion for summary judgment was filed by the City and ES&G in March, 1991. In April, 1991, General Casualty filed a cross-motion for summary judgment which stated that (a) since no "suit seeking damages" had been filed, no duty to defend was triggered; (b) the insured's failure to give timely notice of an occurrence or claim precluded coverage under the policies; and (c) the bad faith claim ought to be dismissed. Aetna filed a similar cross-motion for summary judgment.

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environmental repair.

[10]The work plan was prepared and then filed July 11, 1991, in the DNR's southern district headquarters.

In May, 1991, the circuit court granted the City's and ES&G's motion for summary judgment and denied the cross-motions. However, the court did dismiss the bad faith claim.[11] In July, 1991, the circuit court entered an amended judgment from which General Casualty and Aetna appealed.

The court of appeals affirmed that part of the judgment which denied the insurers' cross-motions for summary judgment and reversed that part of the judgment which granted ES&G's and the City's motion for summary judgment. The court of appeals concluded that (a) the insurers' duty to defend was not triggered by the PRP letters from the EPA in June, 1989, but was triggered by the receipt of the letters from the DNR in February, 1990; (b) the DNR letters unequivocally imposed upon the City and ES&G responsibility to remediate and clean up the landfill or to bear the cost of the remediation which necessitated a defense by the insurers; and (c) remediation costs are damages within the meaning of the term in the policies.

Summary judgment under sec. 802.08(2), Stats.,[12]

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[11]Both General Casualty and Aetna moved the circuit court, as an alternative to their cross-motions for summary judgment, to order a continuance so as to permit additional discovery. The circuit court ultimately did not rule on the motions for a continuance, and the court of appeals decision rendered moot each insurer's claim that the circuit court erroneously exercised its discretion by not addressing those motions.

[12]Section 802.08(2), Stats., provides:

802.08 Summary judgment....

shall be rendered when no genuine issue as to any material fact exists, and the moving party is entitled to a judgment as a matter of law. Summary judgment should not be granted "unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy...." *Grams v. Boss,* 97 Wis. 2d 332, 338, 294 N.W. 2d 473 (1980). A party seeking summary judgment must, therefore, demonstrate to the court that a trial is unnecessary by establishing a record which sufficiently illustrates that no triable issues of material fact exist on any issue presented. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W. 2d 831 (1980) (citing *Hilkert v. Zimmer*, 90 Wis. 2d 340, 342, 280 N.W. 2d 116 (1979)). If the movant's papers before the court do not clearly establish the absence of such a material fact, the court shall deny the motion. *Grams*, 97 Wis. 2d at 339.

On appeal, this court must review the grant or denial of a summary judgment motion by applying the standards set forth in sec. 802.08, Stats., just as the circuit court is to apply them. *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991) (citing *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W. 2d 816 (1987)).

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(2) Motion.... The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

DUTY TO DEFEND

Every insurance agreement functions as a contract between the insured and the insurer. Each party to the contract owes certain duties and obligations to the other. The issue in this case is not, as the dissent infers, "Who will pay the costs of environmental cleanup?", but is one of interpretation of the insurer's contractual duties. The insurer maintains two obligations, the duty to indemnify the insured in the event of a loss and the duty to defend the insured against suits which fall under the terms of the policy. *See* Mitchell L. Lathrop, *Insurance Coverage for Environmental claims* sec. 8.03[1][a] at 8-24 (1994). The duty to defend "is predicated on allegations *in a complaint* which, if proved, would give rise to recovery under the terms and conditions of the insurance policy." *Elliott v. Donahue*, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403 (1992) (emphasis added) (citing *Sola Basic Industries, Inc. v. U.S. Fidelity & Guaranty Co.*, 90 Wis. 2d 641, 646, 280 N.W.2d 211 (1979)). As the court of appeals stated in *Nichols v. American Employers Ins. Co.*, 140 Wis. 2d 743, 749, 412 N.W.2d 547 (Ct. App. 1987):

> The duty to defend exists independent of the duty to investigate. Indeed, a duty to defend does not even arise until there has been a suit initiated. *See Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1183 (7th Cir. 1980) *cert. denied* 449 U.S. 1033 (1980). As *Sola Basic* points out, once the suit is initiated, the insurer must make a determination of whether it is obligated to defend the suit. The determination is made based upon the allegations in the third party's complaints.

The language of the policy issued by General Casualty states that the company maintains the "right and duty to defend *any suit* against the insured *seeking damages....*" (Emphasis added.) Aetna's excess insurance policy for ES&G similarly states that the company will "defend *any suit seeking damages* which are not payable on behalf of the insured under the terms of the policies of Underlying Insurance...." (Emphasis added.) Neither policy requires the insurance companies to defend against a "claim" made against an insured. The only duty imposed on the insurers is to defend against suits seeking damages from the insureds.

Therefore, in order to determine whether the insurance companies have a duty to defend in this case, we must decide whether there is a suit seeking damages against the insureds.

WHAT CONSTITUTES A "SUIT"?

The expansive authority granted to state and federal agencies under CERCLA, in order to initiate environmental cleanup of hazardous waste, has had the effect of producing a flood of litigation so as to determine who will pay the cleanup costs--the PRP or the PRP's insurer. Though comprehensive analyses of insurance policy language and policy drafting records have been performed by courts across the country, there has been no definitive, nationwide resolution of the ultimate issue--whether the general comprehensive liability policy--the "CGL"--imposes a duty to defend a federal or state demand for environmental

remediation and cleanup costs.[13] Instead, courts have

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[13]A majority of courts *have not* conclusively determined that a CGL imposes a duty to defend following the receipt of a PRP letter. Rather, courts have bene very divided on this issue when analyzing (a) the nature and timing of the acts which give rise to a pollution-related problem; (b) the role the CGL insured plays in those acts; and (c) the nature of the relief sought against the CGL insured. *See* Barry R. Ostrager, *Special Insurance Coverage Issues Arising Out of Hazardous Waste/Environmental Clean-Up Litigation*, American Law Institute (1993). Further, one must carefully distinguish among the issues raised in this type of environmental litigation, in addition to the duty to defend: the role of the pollution exclusion clause, the scope of CGL coverage for environmental claims, and coverage under the personal injury endorsement. Again the split among the courts is far more self-evident than a majority view.

For example, the following is a partial list of decisions which have held that a duty to defend was invoked with the issuance of a PRP letter: *Village of Morrisville Water & Light Dept. v. USF&G*, 775 F. Supp. 718 (D. Vt. 1991) (the EPA clearly warned the insured of the probability of imminent government action, enforceable by a court of law, if it did not respond to the letter; the PRP letter is the equivalent to the start of a lawsuit); *Avondale Industries, Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314 (S.D. N.Y. 1988), *aff'd* 887 F.2d 1200 (2d Cir. 1989), *reh'g denied* 894 F.2d 498 (2d Cir. 1990), *cert. denied* 496 U.S. 906 (1990) (an action may be taken which binds the insured before a suit is filed; since damages may be determined before the parties arrive in court, the administrative process is part of the litigious process which triggers the obligation to defend); *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (the duty to defend is not restricted to the traditional lawsuit for money damages, but extends to the actual or threatened use of the legal process to coerce payment); *Hazen Paper v. U.S. Fidelity and Guar.*, 407 Mass. 689, 555 N.E.2d 576 (1990) (though literally there is no suit, the litigation defense protection purchased by Hazen would be compromised if USF&G did not defend in response to the EPA letter); *Minnesota Min. & Mfg. v. Travelers Indem.*, 457 N.W.2d 175 (Minn. 1990) (the issue of coverage does not depend merely on the form of action taken against the insured; the proceeding commenced is equally

developed definitions of what constitutes a "suit" when environmental cleanup is required.

The CGL, which emerged onto the insurance industry scene in the early 1940's, provided broad, comprehensive insurance and served as a replacement for specific risk policies. *See* Paul V. Majkowski, Note, *Triggering the Liability Insurer's Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a "Suit"?*, 67 St. John's L. Rev. 383, 384 n. 3

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as coercive as a civil judgment against the insured); and *Cascade Pole Co. v. Reliance Insurance Co.*, No. 88-2-2316-3 (Wash. Super. Ct. March 20, 1992) (a PRP letter is a suit because remediation and response costs may be incurred and because they establish adversarial relationships).

The following decisions have held that a PRP letter does not trigger the duty to defend under a CGL policy: *Harter Corp. v. Home Indem. Co.*, 713 F. Supp. 231 (W.D. Mich. 1989) (the court cannot construe an EPA threat to hold the insured liable for cleanup costs as a suit seeking damages without doing violence to the plain meaning of the word "suit"); *State of N.Y. v. Amro Realty Corp.*, 697 F. Supp. 99 (N.D. N.Y. 1988) (there is no duty to defend until an actual complaint in an environmental lawsuit is forwarded to the insurer); *Detrex Chem. Industries v. Emp. Ins. of Wausau*, 681 F. Supp. 438 (N.D. Ohio 1987), *modified on reh'g* (applying Wisconsin law), *reaff'd* 746 F. Supp. 1310 (N.D. Ohio 1990) (applying Michigan law) (a claim for damages made against the insured that might result in liability is not synonymous with a suit and not enough to trigger the duty to defend); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (no obligation to defend since the attorney general had not sued for cleanup costs; an administrative arena to compel cleanup was merely sought); and *Technicon Electronics v. American Home*, 141 A.D. 2d 124 (N.Y. App. Div. 1988), *aff'd on other grounds* 542 N.E. 2d 1048 (1989) (the PRP letter does not constitute a suit).

(1993).[14] The duty to defend clause in most CGL policies beginning in 1973 stated that "the company shall have the right and duty to defend any suit against the insured seeking damages on account of such [covered] bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent...." *See* Donald E. Shrape & Jean K. Shaffer, *The Parameters of an Insurer's Duty to Defend*, 19 Forum 555, 556 (1984).[15] The specific language in the comparable clause of the General Casualty policy at issue in this case reads in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become

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[14]As Mr. Majkowski notes in his article, insurance industry trade organizations produced a standard CGL form following a series of drafts from 1941 to 1973. Coverage as of 1966 was provided for any "occurrence" as opposed to "accidents." "Occurrence" was defined as "'an accident, including *injurious exposure to condition*, which results [in injuries or damages] ... neither expected nor intended from the standpoint of the insured....'" (Emphasis added.) during the period of these revisions, coverage was expanded and included pollution claims. However, by 1986, the insurance industry drafted a more strict CGL form in order to limit coverage of various pollution claims. *Id.* Disputes under the stricter CGL forms focus on the meaning of "damages" and absolute pollution exclusion provisions.

[15]The interpretation of the CGL regarding potential coverage for PRP notification letters has posed problems for courts across the country. The PRP notification describes a form of liability not compatible with pre-1980 policy language. As a result of CERCLA, a new type of remedy has come into being: combining monetary relief with site cleanup. Additionally, fines may be assessed which were not historically contemplated by a CGL insurer. *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* sec. 8.03 (1991); *see also Whether Insurers Must Defend*, 10 N. Ill. U.L. Rev. at 582.

legally obligated to pay as damages because of

A. bodily injury or
B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend *any suit against the insured seeking damages* on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(Emphasis added.)

When ES&G and the City responded to the EPA and DNR letters, both were involved in an administrative procedure pursuant to CERCLA. Therein lies the heart of the dispute: does the duty to defend in a CERCLA proceeding arise at this administrative level? The controversy is further complicated by the fact that CERCLA was designed to have an anti-litigation bias. 42 U.S.C. sec. 9622(a) states that "[w]henever practicable ... [the EPA] shall act to facilitate [settlement] agreements ... in order to expedite effective remedial actions and minimize litigation." Therefore, notice

letters have been used by the EPA as a primary method to effect voluntary settlements with PRPs. However, if a PRP chooses to ignore the notice letter, it may face liability for recovery costs into the tens of millions of dollars resulting from EPA-initiated cleanup.

Some courts have concluded that PRP letters have a unique nature within the context of a CERCLA administrative proceeding. These courts have held that the receipt of PRP letters is the "functional equivalent of a suit" because (a) the letters maintain a confrontational and adversarial posture, and (b) they create the specter of devastating financial consequences if voluntary cooperation is not forthcoming. As a result, PRP liability for immediate and long-range cleanup and remediation costs necessitates a legal defense.[16]

We conclude that neither a PRP letter nor a comparable notification letter by a state agency such as the

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[16]Requests to insurers for a defense are often made in conjunction with a reimbursement request for the following: (a) the retention of environmental consultants; (b) the formulation and implementation of remedial work plans; and (c) investigation costs. *See Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.* 948 F.2d 1507 (9th Cir. 1991); *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 728 F. Supp. 1310 (E.D. Mich. 1989), *rev'd in part, reh'g denied* 974 F.2d 754 (6th Cir. 1992); *Avondale Industries, Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314 (S.D. N.Y. 1988), *aff'd* 887 F.2d 1200 (2d Cir. 1989), *reh'g denied* 894 F.2d 498 (2d Cir. 1990), *cert. denied* 496 U.S. 906 (1990) (receipt of a PRP letter could have immediate adverse consequences for the insured, and the administrative process is part of a "litigious process" that triggers the duty to defend); *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (coverage does not hinge on the form of the action taken or the nature of the relief sought); and *Minnesota Min. & Mfg. v. Travelers Indem.*, 457 N.W.2d 175 (Minn. 1990).

DNR triggers the insurer's duty to defend. Though the court of appeals was correct when it concluded that the PRP letters to the City and ES&G did not trigger the insurers' duty to defend, it should have arrived at the same conclusion regarding the DNR letters. Those letters stated in pertinent part:

> On November 6, 1989, the Department forwarded to you the CERCLA 104(a) responses it received as part of a potential responsible party (PRP) search for the Edgerton Sand and Gravel landfill site. These responses were forwarded to you as part of a joint effort to begin remediation of the known environmental impacts from the site. To date the Department has not received any progress reports on your efforts to arrange for a PRP clean up of the landfill. In our November 6, 1989, letter the Department stated that failure of the PRP's to reach agreement on a clean up plan would force the Department to pursue having the site included on the Superfund National Priorities List (NPL).
>
> The environmental problems associated with this site dictate that remediation work begin soon. Consequently, the Department will allow you only another 30 days from the date of this letter to propose a PRP implemented remediation work plan....
>
> The work plan must contain a detailed discussion of the tasks to be performed and a

> timeline for the tasks to occur.... Also, a legally enforceable contract between the Department and the PRP's must be signed within 60 days after a PRP work plan is submitted to the Department, to ensure that the work is completed properly and on schedule.

The DNR then went on to state that if an acceptable work plan was not submitted by the deadline date, it would pursue the following action: (a) an attempt to have the landfill listed on the NPL as quickly as possible and (b) legal action under state authorities to have the site investigated and cleaned up. The DNR also referred to statutory authority under secs. 144.43 to 144.79, Stats., by which the DNR could order the City and ES&G to remediate damage caused by the landfill.[17]

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[17]In sec. 144.01, Stats., the following applicable terms are defined: "environmental pollution," "hazardous substance," "solid waste," and "owner."

Subchapter IV of ch. 144 focuses upon solid and hazardous waste management and cleanup. Specifically, sec. 144.431 gives the DNR the following powers and duties regarding solid waste:

> **144.431 Solid waste; powers and duties.** (1) The department shall:
>
> (a) Promulgate rules implementing and consistent with ss. 144.43 to 144.47.
>
> (b) Encourage voluntary cooperation by persons and affected groups to achieve the purposes of ss. 144.43 to 144.47.

(c) Encourage local units of government to handle solid waste disposal problems within their respective jurisdictions and on a regional basis, and provide technical and consultative assistance for that purpose.

(d) Collect and disseminate information and conduct educational and training programs relating to the purposes of ss. 144.43 to 144.47.

(e) Organize a comprehensive and integrated program to enhance the quality, management and protection of the state's land and water resources.

(f) Provide technical assistance for the closure of a solid waste disposal facility that is a nonapproved facility, as defined in s. 144.441(1)(c).

(2) The department may:

(a) Hold hearings relating to any aspect of the administration of ss. 144.43 to 144.47 and, in connection therewith, compel the attendance of witnesses and the production of evidence.

(b) Issue orders to effectuate the purposes of ss. 143.43 to 144.47 and enforce the same by all appropriate administrative and judicial proceedings.

(c) Secure necessary scientific, technical, administrative and operational services, including laboratory facilities, by contract or otherwise.

(d) Advise, consult, contract and cooperate with other agencies of the state, local governments, industries, other states, interstate or interlocal agencies, and the federal government, and with interested persons

Neither letter has the attributes of a "suit." *See Detrex Chem. Industries v. Emp. Ins. of Wausau*, 681 F. Supp. 438, 446 (N.D. Ohio 1987) ("[A] claim for damages made against [the insured] that *might* result in its legal liability is not synonymous with a 'suit' so as to trigger [the insurer's] duty to defend....") (Emphasis added.)[18] This court has recently

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or groups.

(e) Inspect solid waste facility construction projects to determine compliance with ss. 144.43 to 144.47 and rules promulgated and licenses issued under those sections.

Section 144.442, Stats., focuses upon environmental repair. Specifically, sec. 144.442(4) provides the DNR with the authority to conduct investigations of sites or facilities which pose an environmental pollution hazard. It is under this section that the DNR identifies PRPs. Section 144.442(5) authorizes the DNR to promulgate rules under which remediation plans are established. Section 144.442(6) provides the DNR with authority to take action for the purpose of environmental repair. Finally, under sec. 144.442(8) the DNR may take action to implement CERCLA by means of advising, consulting, assisting, and contracting with other interested parties.

[18]It should be noted that the Court in *Detrex* stated in dicta that the duty to defend would be triggered by a cost recovery action, an action for injunctive relief, or a state administrative proceeding in which a state agency was performing traditional judicial activities, thereby acting in a judicial capacity. Specifically, the court stated, "Until, pursuant to Section 9606, the EPA resorts to a court injunction or to a mandatory court order to enforce a section 9606(a) administrative order, ... a 'suit' would not be brought against [the insured] that would trigger [the insurer's] duty to defend." *Id.* None of the above actions occurred in the instant case. Rather, correspondence from the EPA was confined to information requests, at the early stages of the PRP compliance process. The DNR, in correspondence dated February, 1990 and February, 1991, detailed what

examined the attributes of a "suit" in *State v. P.G. Miron Const. Co., Inc.*, 181 Wis. 2d 1045, 512 N.W.2d 499 (1994), wherein we defined "suit" as

> 'any proceeding by one person or persons against another or others *in a court of law* in which the plaintiff pursues, *in such court*, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or equity.'

Miron, 118 Wis. 2d at 1053 (quoting *Black's Law Dictionary* 1434 (6th ed. 1990)) (emphasis added in *Miron*) (the use of arbitration under a contract between a private party and the state does not violate the doctrine of sovereign immunity because arbitration does not subject the state to suit). Thus, the primary attribute of a "suit" is that parties to an action are involved in actual court proceedings, initiated by the filing of a complaint. Despite the dissent's attempt to expand the word "suit," definitions of suit or legal process all involve a court action.[19] The clearest example of this is the fact that the

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action *may* be taken if a remediation work plan was not forthcoming from the City and ES&G. Neither letter identified any *legal* action which had already been initiated.

[19]For example, *Black's Law Dictionary* defines "legal proceedings" as follows:

> **Legal proceedings.** Term includes all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.

parties to the instant case were made part of a "suit" when a declaratory action was begun to identify General Casualty's and Aetna's obligations under the insurance policies.

Rather than initiating a suit, the letters from the EPA and the DNR to General Casualty and Aetna were used to gather information regarding hazardous substances at the site, as well as to call for voluntary action by the City and ES&G in the process of cleanup.[20] The court of appeals concluded that additional correspondence in February, 1991, from the DNR's Bureau of Legal Services moved the proceedings beyond the information-gathering stage. Specifically, the court referred to the following language of the letter:

> WDNR intends to pursue listing of this site on the NPL unless potentially responsible parties (PRPs) for the site enter into a contract with WDNR to undertake investigation and clean-up activities....

Black's Law Dictionary 896 (6th ed. 1990).

"Process" has also been defined as "[t]he entire course of a judicial proceeding." *The American Heritage Dictionary of the English Language* 1444 (3d ed. 1992).

[20]*See Technicon Electronics v. American Home*, 141 A.D.2d 124 (N.Y. App. Div. 1988), *aff'd on other grounds* 542 N.E.2d 1048 (1989). The court concluded that "[t]he EPA letter at issue merely informed Technicon of its potential liability under CERCLA and that the EPA was interested in discussing Technicon's voluntary participation in remedial measures. The letter was an invitation to voluntary action on Technicon's part and is not the equivalent of the commencement of a formal proceeding within the meaning of the subject comprehensive general liability policies." Technicon, 141 A.D.2d at 146.

> The purpose of this letter is to notify you that unless a PRP group signs a contract with WDNR for this site by May 31, 1991, WDNR will request that this site be listed on the NPL.... For NPL sites, U.S. EPA adheres to a very strict timeframe for negotiation of Administrative Consent Orders. These Consent Orders generally require, among other things, strict compliance with the NCP [National Contingency Plan], reimbursement of agency oversight costs ... liquidated damages for noncompliance and the potential for treble damages. If the negotiation of a Consent Order is not successful, U.S. EPA may issue an Order requiring the PRPs undertake specific action or undertake the action and sue to recover its costs from the PRPs. U.S. EPA may seek forfeitures for non-compliance and treble damages may also be available.

Indeed, this correspondence indicates that there was some movement beyond the fact-gathering stage. However, there was no movement into the realm of a suit. The correspondence served to inform the PRPs of action which may be pursued, *or not*, depending upon the response by the City or ES&G. This letter cannot be considered the equivalent of a service of process so as to initiate a suit.

However, the court of appeals adopted the reasoning of *Ryan v. Royal Ins. Co. of America*, 916 F.2d 731 (1st Cir.

1990),[21] in which the court articulated a four-part test to determine if a PRP letter was the "functional equivalent of a suit": (a) the letter's coerciveness; (b) the letter's adversariness; (c) the seriousness of effort with which the government hounds an insured; and (d) the gravity of the imminent consequences. *Id.* at 741. The court of appeals then concluded that the EPA and the DNR had assumed an adversarial approach toward the City and ES&G and that devastating financial consequences would result from a failure to enter into the requested contract. Therefore, there existed a degree of compulsion which necessitated a defense.

We disagree with the conclusion of the court of appeals. Though the tone of the correspondence may be termed confrontational, neither the EPA's PRP letters nor the DNR letters *by themselves* impose liability. Also, if the City or ES&G failed to respond to the letters, that failure alone would not authorize the assessment of fines. Instead, something more in the form of a court proceeding would be required to "*force or compel* the insured to take action or suffer serious consequences." *See Professional Rental v. Shelby Ins.*, 75 Ohio App. 365, 375, 599 N.E.2d 423, 430 (1991) (emphasis in original). For example, the EPA could issue, and then seek to have enforced, an administrative order

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[21]In *Ryan*, the court noted that the owner of a contaminated site had a somewhat desultory correspondence with the New York Department of Environmental Conservation regarding the closure and cleanup of the affected site. Ryan sued his insurer, Royal Insurance, for failure to defend and indemnify under the policies. At issue was whether the correspondence between Ryan and the Department of Conservation, regarding contamination and cleanup, was the functional equivalent of a suit sufficient to trigger the insured's duty to defend.

pursuant to 42 U.S.C. sec. 9606(a) or 9604(e)(5)(A);[22] it could seek an injunctive order in federal district court under 42 U.S.C. sec. 9606(a);[23] or it could initiate a cost recovery action under 42 U.S.C. sec. 9607.[24] *Id.* Indeed, the February 8, 1991, letter from the DNR stated that if the City and ES&G did not sign the proposed contract and the site was listed on the NPL, primary responsibility for cleanup activities would shift to the EPA. If that had occurred, then the EPA administrative orders may come into play. Prior to that time,

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[22]Though the EPA encourages voluntary participation in the cleanup and remediation efforts by means of PRP notification letters, it is authorized under 42 U.S.C. sec. 9606(a) to issue administrative orders to compel a PRP to clean up a site. The EPA may negotiate the administrative order with the PRP; if successfully done, it becomes a binding consent order. If the negotiations fail, the EPA may then unilaterally develop the administrative order, which has the effect of accelerating compliance, since a fine of $25,000 is imposed for each day the PRP does not comply. 42 U.S.C. sec. 9606(b)(1)

[23]Under 42 U.S.C. sec. 9606(a), the EPA may seek an injunctive order, through the Department of Justice, in order to compel a PRP to comply with the cleanup plan.

[24]If a PRP decides not to respond to the PRP letter or does not participate in cleanup operations, the federal government may, under CERCLA, use Superfund money to clean up the site and then seek reimbursement from any responsible party. *See* 42 U.S.C. secs. 9604(a)(1) and 9607(a).

Again, the legislative bias in CERCLA is to seek voluntary settlement and cleanup. However, the EPA may also force the government to order a cleanup, or request the government to unilaterally implement cleanup, followed by litigation wherein reimbursement is sought. *See Professional Rental*, 75 Ohio App. at 373-74, 599 N.E.2d at 428-29.

the DNR offered the City and ES&G options under which all concerned parties might cooperate in order to clean up and remediate the landfill.[25] None of the options offered by the DNR rose to the level of a court proceeding.

If the EPA's conduct in sending the PRP letter or the DNR's letter requesting site remediation is construed as initiating a "suit seeking damages," the duty to defend would be mandated under the terms of the policy. Such a result would create a duty for the insurer for which it had not

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[25]The court in *Professional Rental* noted the following regarding PRP notifications:

> The CERCLA notification process is clearly not analogous to the traditional means of bargaining and settlement. 'Settling' with the EPA primarily involves formulating an acceptable proposal for cleaning up the pollution under the assumption of PRP liability. Although the EPA designates recipients as 'potentially responsible parties,' it is not the equivalent of a conventional demand letter or a simple accusation of fault. First, PRP notifications are sent after the EPA has established that 'there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA.' Superfund Program, 53 F.R. at 5301. Second, parties who are simply 'identified' as responsible under Section 107(a) are strictly liable, regardless of fault. The only defense (other than an act of God or war) is the limited defense of 'due care' provided in CERCLA Section 107(c)(3)....

Professional Rental, 75 Ohio App. at 374, 599 N.E.2d at 429.

contracted.[26] This court has stated that a primary goal in interpreting insurance policies is to ascertain and carry out the true intentions of the parties. *See Kremers-Urban Co. v. American Employers Ins.*, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). As a result, the words of a policy are to be given their plain and ordinary meaning. *Id.* The meaning of the terms of the policy is assessed by a reasonable person in the position of the insured and that reasonable insured's expectations of coverage. *Id.* However, an insured's expectations may not be satisfied in contradiction to policy

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[26]More importantly, it is an obligation for which an insurer may not be prepared. Typically, insurers assess the extent of the risks insured under policies issued. The risk of liability may then be spread among groups of insureds and premiums assigned only after the extent of the risk is determined. The original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for the insurer in the contract of insurance. Policies of insurance, premised upon a certain level of predictability and assessment of risk at the time of contracting, lose their effect without the inclusion of certain basic definitions. *See Whether Insurers Must Defend*, 10 Ill. U.L. Rev. at 595; Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* 103 (1986); 2 *Couch on Insurance 2d* sec. 15:4 (2d ed. 1984); *U.S. Fidelity and Guar. v. Star Fire Coals, Inc.*, 856 F.2d 31, 33 (6th Cir. 1988) (insurers need to rely on policy language in order to efficiently manage risks) (citing *United States Fire Ins. v. Kentucky Truck Sales*, 786 F.2d 736, 739 (6th Cir. 1986) ("[T]he court must give all terms their plain meanings and *not rewrite an insurance contract to enlarge the risk.*) (Emphasis added.)

As noted earlier, CGLs were formulated and revised between 1940 and 1973. Risk assessment in pre-1980 CGLs did not incorporate liability under CERCLA. Therefore, potential liability was not spread among polluting insured. *Whether Insurers Must Defend*, 10 N. Ill. U.L. Rev. at 596; Hapke, *Federal Circuit Court Decisions Contaminate Superfund Policy*, 19 Envtl. L. Rep. 10393 (1989).

language which clearly identifies the scope of the insured's coverage. Thus, "[w]here the parties have contracted to limit recovery to a specific quantifiable type of remedy, a court should not alter the insurance contract to include other types of remedies not contracted for by the parties and that may not be presently quantifiable." *Shorewood School Dist.*, 170 Wis. 2d at 369.

We find no ambiguity in the term "suit" as it has been used in the insurance policies. "Suit" denotes court proceedings, not a "functional equivalent." The dissent believes that a reasonable policyholder would view letters from a federal or state agency advising an insured of liability as a "suit." To the contrary, the word "suit" is easily understood and unambiguous to a reasonable policyholder. The proof is in the decisions that hold that a "PRP letter" is the "functional equivalent of a suit." Either there is a suit or there is not. When there is no suit, there is no duty to defend. Therefore,

> [t]o determine whether a duty to defend exists, the complaint claiming damages must be compared to the insurance policy and a determination made as to whether, if the allegations are proved, the insurer would be required to pay the resulting judgment. The insurer need only look at the allegations within the four corners of the complaint to make such a determination.

Id. at 364-65.

Construing either the EPA's PRP letter or the DNR letters as the "functional equivalent of a suit" would be contrary to present Wisconsin insurance law since (a) the insurer would have to look beyond the four corners of the complaint in order to assess whether a potentially covered claim exists, and (b) the insurer would be put in the position of anticipating a coverage expectation for which it did not contract or receive payment. In this case, no complaint has been filed which would initiate a suit and invoke the insurers' duty to defend.[27] Therefore, no matter how coercive the language of the DNR letter was considered to be, it was used within the realm of an *administrative* proceeding. It did not have the effect of initiating a suit.

CERCLA SUPERFUND RESPONSE COSTS DO NOT CONSTITUTE DAMAGES

Standard CGL policy language requires a duty to defend a suit seeking damages, which, if proved, would give rise to recovery under the terms and conditions of the policy. *Elliott*, 169 Wis. 2d at 320-21. The insurer has to defend suits against the insured requesting recovery for sums that the

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[27]*See also Reliance Ins. v. Royal Motorcar Corp.*, 534 So. 2d 922, 923 (Fla. Dist. Ct. App. 1988) (an insurer's duty to defend is determined solely by the complaint's allegations); *American Alliance Ins. v. Frito-Lay*, 788 S.W.2d 152, 153-54 (Tex. Ct. App. 1990) (there must be an examination of the allegations in the complaint to determine if a duty to defend exists); *Viking Ins. Co. of Wisconsin v. Hill*, 57 Wash. App. 341, 787 P.2d 1385 (1990) (the duty to defend is determined by a review of the allegations on the face of the pleading which gave rise to the covered action); and *Grieb v. Citizens Casualty Co.*, 33 Wis. 2d 552, 557, 148 N.W.2d 103 (1967) (whether a third-party suit comes within a defense-coverage clause depends upon the allegations in the complaint).

insured may become legally obligated to pay *as damages*. The *as damages* qualifier appears in the policies at issue in the bodily injury, property damage, and personal injury coverages. However, contrary to the conclusion of the court of appeals, the CGL policies in this case do not provide coverage for Superfund response costs, since such costs do

not constitute damages.[28] Additionally, the parties did not contract for such coverage.

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[28]42 U.S.C. sec. 9607(a) states in pertinent part:

> (4) [A] person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; ... [and]
> >
> > (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release....

It should be noted that the National Contingency Plan is developed under CERCLA by the EPA. The plan establishes procedures for the cleanup of hazardous waste sites.

When dealing with the issue of damages, courts have disagreed as to whether a CGL policy's reference to "damages" includes cleanup costs, such as at issue in this case. Courts which interpret "damages" more broadly conclude that coverage includes claims brought under either sec. 9607(a)(4)(A) or (C). *See* Kristin A. Kolesar, Note, *Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste in the Legal Environment*, 68 Notre Dame L. Rev. 549, 553-54 (1993) [hereinafter *Insurance Coverage for CERCLA Claims*].

In *Shorewood School Dist.*, this court stated that "'[d]amages' as used in ... insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature. The term 'damages' does not encompass the cost of complying with an injunctive decree." *Shorewood School Dist.*, 170 Wis. 2d at 368. Further, this court stated that the

> limited construction of the term 'damages' is consistent with the basic grant of coverage in the insurance policies. The insurers agree to pay 'all sums which the insured shall become legally obligated to pay *as damages.*' The insurers did not agree to pay '*all sums* which the insured shall be come legally obligated to pay.' The addition of 'as damages' serves as a qualifier, a limit to coverage.

Id. at 369-70 (emphasis in original). Consistent with conclusions of other courts, this court has concluded that if the term "damages" is given a broader or more expansive interpretation, the phrase "as damages" would be rendered mere surplusage, since any expenses prior or incidental to litigation would be covered by the policies. *Id. See also Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied* 484 U.S. 1008 (1988) ("[i]f the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract ... would become mere surplusage, because any obligation to pay would be covered...."); *Continental Ins. v. Northeastern Pharmaceutical*, 842 F.2d 977 (8th Cir. 988), *cert. denied sub nom. Missouri v. Continental Insurance Cos.*, 488 U.S. 821 (1988) (Northeastern's CGL policies did not provide coverage

for reimbursement of response costs under CERCLA; the phrase "as damages" is not ambiguous, since the plain meaning of the term as used in the insurance context refers to legal damages and not equitable monetary relief).

Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C). *See Insurance Coverage for CERCLA Claims*, 68 Notre Dame L. Rev. at 561. Indeed, the federal government has stated that

> [n]atural resource damage assessments are not identical to response or remedial actions addressed by the larger statutory scheme of CERCLA.... Assessments are not intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for determining proper compensation to the public for injury to natural resources.

51 Fed. Reg. 27,674 (1986); *Insurance Coverage for CERCLA Claims*, 68 Notre Dame L. Rev. at 561 n. 76. Therefore, as an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of injunctive action, while providing for remediation and cleanup of the affected site. This type of relief is distinct from that which is substitutionary--monetary compensation provided to make up

for a claimed loss. *Shorewood School Dist.*, 170 Wis. 2d at 369. Although the dissent takes the position that the insurers should be responsible for the response costs, the insurers never assumed a contractual responsibility to pay to remove hazardous materials and to prevent future harm.

Finally, CERCLA expressly permits PRPs to insure against the type of costs imposed under this legislation. 42 U.S.C. sec. 9607(e)(1) states:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

However, the CGL at issue in this case did not by its terms provide for such coverage. We examine only the terms of the policies for which the parties initially contracted.

In conclusion, we hold that General Casualty and Aetna do not have a duty to defend against the actions of the EPA and the DNR, requesting environmental cleanup, because no suit seeking damages has been filed against the insureds. Accordingly, we affirm in part and reverse in part the decision of the court of appeals and remand to the circuit court with directions to deny the motion for summary

judgment of the City and ES&G and to enter summary judgment on behalf of General Casualty and Aetna.

By the Court. --The decision of the court of appeals is affirmed in part and reversed in part, and the cause is remanded to the circuit court with directions.

SHIRLEY S. ABRAHAMSON, J. *(dissenting).* CERCLA environmental clean-up cases involve "one of the largest and most costly areas of civil litigation." 7A Appleman, Insurance Law and Practice, sec. 4520, p. 126 (1993 Supp.). The court's decision determines who will pay the costs of environmental clean-up in Wisconsin--the insureds or the insurance companies. Courts across the country have divided on the complex legal questions behind this very practical problem.

I conclude, as did the circuit court, a unanimous panel of the court of appeals, and the majority of state and federal courts which have decided similar cases[1] that the insureds are

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[1]As I previously stated, the courts are divided. I rely on secondary material for surveys of the federal and state court decisions to determine the majority rule. According to these sources, a slim majority of the courts have held that the policy imposes a duty to defend following receipt of a PRP letter; a larger majority apparently concludes that response costs are damages under the policy. For surveys of the cases, *see, e.g.,* Kenneth H. Mack, *Insurance Coverage of Environmental Claims*, Practicing Law Institute (April-May 1993) at 4 (Westlaw citation: 459 PLI/Lit 261, PLI Order No. H4-5152; Database JLR); Barry R. Ostrager, *Special Insurance Coverage Issues Arising out of Hazardous Waste/Environmental Clean-Up Litigation*, American Law Institute (June 21, 1993) at 25-35, 40-48 (Westlaw citation: C855 ALI-ABA 1005; Database JLR); Mary Kay Vyskocil, *Environmental Coverage Litigation: An Overview of Trends and*

covered by the insurance policies. The very well written court of appeals decision, *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), carefully reviews the numerous cases and authorities. It does not need to be amplified by this dissent. I write briefly to explain where, in my opinion, the reasoning of the majority opinion falters.

I.

The majority opinion holds that the insurance company's duty to defend a "suit" arises only on the commencement of an action in a court of law. I conclude that the majority's interpretation of the word "suit" as used in the policy is erroneous and that the duty to defend may be prompted by administrative action. Because the majority concludes that "suit" is limited to a court action, I need not address, as did the court of appeals, which step in the administrative process triggers the duty to defend.

First, the majority's interpretation contravenes the general rules applicable to contract interpretation that the objective of interpreting the policy is to ascertain and carry out the intention of the parties. Words in a policy must be given their plain and ordinary meaning; they must be interpreted to mean what a reasonable person in the position of the insured would have understood them to mean.

Developments Practicing Law Institute (January-February 1993) at 6-11, 18-24 (Westlaw citation: 454 PLI/Lit 443, PLI Order No. H4-5148; Database JLR).

The majority opinion states in a conclusory fashion that "suit" denotes court proceedings. While one dictionary definition of "suit" is an action in court, the dictionary also gives the word the broader meaning: "the attempt to gain an end by legal process: prosecution of right before any tribunal: litigation." Webster's Third New International Dictionary (1986) 2286.[2] Thus suit, according to a dictionary or real life, is not limited to proceedings in court.

While courts frequently duel with dictionary definitions, many of which are circular, the real point is that the dictionaries show multiple meanings for the word "suit" and that a reasonable understanding of the word "suit" is not limited to an action filed in court.

From the point of view of a reasonable policy holder, official letters from a federal or state agency advising an insured of liability, with increasing penalties if the insured does not respond, appear to be an adversary's attempt to gain an end by a legal process. Such administrative proceedings may force the insured to hire technical experts and lawyers to

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[2]When I examine the dictionary definitions of "process" and "litigation," they too have multiple meanings. "Process" is defined as "the course of the procedure in a judicial action or in a suit in litigation: legal action." Webster's Third New International Dictionary (1986) 1808. "Litigation" is defined as "the practice of taking legal action" and also as "a controversy involving adverse parties before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures." Webster's Third New International Dictionary (1986) 1322. While a court would not ordinarily examine a law dictionary, as the majority does, to determine what an objectively reasonable policyholder would have understood the policy to mean, the legal definition of "suit" is similar to Webster's.

protect its interests and may terminate in an action in court. Thus to the insured an administrative action is as coercive a legal process as an action filed in a court of law.

While the word "suit" may have several meanings, semantics make little difference to an objectively reasonable insured in the face of the myriad types of liability that might result from administrative proceedings. The only meaning of the word "suit" in the insurance policy which comports with an insured's objectively reasonable expectations is that it signifies either a court action or an attempt to gain an end by a legal process.

Second, the majority's narrow interpretation of the word "suit" to mean an action commenced in court is neither reasonable nor wise because it fosters litigation. The policy behind CERCLA is to encourage prompt and voluntary clean-up of toxic waste. The antipollution statutes offer the insured incentives to cooperate with the government rather than awaiting a court proceeding. If, as the majority opinion holds, the administrative action does not activate the duty to defend, the insured may refuse to cooperate with the government in order to force the government to file a formal complaint. An interpretation of the policy that encourages an insured not to cooperate with governmental agencies and fosters litigation in lieu of alternative dispute resolution is, on its face, unreasonable.

Third, an examination of the statutory proceedings demonstrates that administrative enforcement is part of litigation. The government has discretion about the type of action to use to combat pollution. By choosing a more expensive option the government can adversely affect the

insured's rights. Because damages might be determined before the parties ever get to court, the need for representation is thus perhaps greatest at the administrative level and the administrative process is obviously part of the litigation process which triggers the obligation to defend. *Avondale Industries, Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314, 1320-22 (S.D. N.Y. 1888), *aff'd*, 887 F.2d 1200 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498 (2d Cir. 1990), *cert. denied*, 496 U.S. 906 (1990). *See also, e.g., Lindas v. Cady*, 183 Wis. 2d 547, ____, 515 N.W.2d 458 (1994), concluding that unreviewed agency determinations may have preclusive effect in court.

Fourth, according to the majority, because our cases state that a court looks to the complaint to determine whether a potentially covered claim exists, the word "suit" must refer to a lawsuit. Majority opinion at _____. These cases, however, do not have anything to do with the case at bar. In all of them, an action in court was in fact filed. These cases can not be used to say that there is no duty to defend unless an action in court is commenced.

Finally, it seems to me that the majority's interpretation of the word "suit" in the context of an insurer's duty to defend is antiquated. In our modern legal world many forms of liability are determined outside the courtroom. This court has by rule enabled trial courts to resolve disputes without clogging the dockets of our trial and appellate court. By creating administrative mechanisms to encourage prompt, voluntary, and efficient environmental clean-up, the state and federal legislatures have attempted to resolve a major societal problem without resorting to the courts. By clinging to an

outmoded definition of the term "suit," the majority defeats this legislative policy.

For the reasons set forth, I agree with the numerous cases that hold that when the government assumes an adversarial posture and makes clear that governmental force will be used with probable and imminent financial consequences, a suit is in progress and the insured might reasonably expect the insurance company to defend.

II.

Although the majority opinion concludes that the insurance company has no obligation at this stage of the administrative proceedings, it nevertheless goes on to hold that response costs do not constitute damages under the policy. I address this damage issue because it is the only damage issue the majority discusses. Again, I conclude, as did the circuit court, a unanimous panel of the court of appeals, and the majority of courts that have considered the issue, that response costs are damages under the policy. The majority opinion's interpretation of the word "damages" in the policy relies heavily on *School District of Shorewood v. Wausau Ins. Co.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992), and is unpersuasive.

First, the majority opinion applies the *Shorewood* discussion of damages to this CERCLA case in a summary fashion, ignoring the language in the *Shorewood* decision by which the court expressly declined to analogize that case to CERCLA cases defining the word "damages." The *Shorewood* court stated: "The issue of whether clean-up costs constitute 'damages' under the terms of an insurance contract

has never been addressed by a Wisconsin court. Such an important issue should not be decided in a cursory fashion by this court. Therefore, we decline to adopt or apply the analogy posited by the school districts." *Shorewood*, 170 Wis. 2d at 374.

Second, were the majority opinion to follow the *Shorewood* rationale to its logical conclusion, it would have to hold that the response costs in this case were damages within the meaning of the policy. The *Shorewood* court's dissection of the word "damages" in a comprehensive general liability policy rests on the analysis of "damages" by Professor Dobbs, whom the court characterized as "a noted authority on remedies." *Shorewood*, 170 Wis. 2d at 368. The *Shorewood* court quoted extensively from Professor Dobbs' 1973 Handbook on the Law of Remedies. *Shorewood*, 170 Wis. 2d 368-69.

In his more recent 1993 revision of his book, Professor Dobbs concludes that response costs under CERCLA cases are "analogous to repair costs and ... common law consequential damages.... Response costs are very high, but in spite of the terminology, they closely resemble familiar common law types of damages." Handbook on the Law of Remedies 727 (1993). Thus adherence to *Shorewood* and its reliance on Professor Dobbs lead to the conclusion that response costs are damages under the standard form policy involved in this case.

For the reasons set forth herein and in the decision of the court of appeals, I dissent.

I am authorized to state that Chief Justice NATHAN S. HEFFERNAN and Justice WILLIAM A. BABLITCH join in this dissent.

No. 91-1408

STATE OF WISCONSIN COURT OF APPEALS
DISTRICT IV

CITY OF EDGERTON,
AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents,

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Co-Appellant,

HANOVER INSURANCE COMPANIES,
WAUSAU INSURANCE COMPIES,
AND LOCAL GOVERNMENT PROPERTY
INSURANCE FUND,

Defendants.

COURT OF APPEALS DECISION DATED AND RELEASED November 25, 1992

APPEAL from a judgment of the circuit court for Rock County; JOHN H. LUSSOW, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Sundby, Cane and LaRocque, JJ.

SUNDBY, J. Edgerton Sand & Gravel, Inc. (ES&G) owns a landfill site in Rock county which it closed December 30, 1984. During 1984 and 1985 it capped the landfill. The city of Edgerton leased the site for a municipal landfill from approximately 1968 to 1984. In 1984 volatile organic compounds (VOCs) were detected in the groundwater under and in the vicinity of the site.

By certified letter dated June 22, 1989, the United States Environmental Protection Agency (EPA), pursuant to section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] [42 U.S.C. § 9604(3)], informed ES&G and the city that it was investigating the circumstances surrounding the presence of hazardous substances in and around the ES&G site. EPA requested that ES&G, the city, and other potentially responsible parties (PRPs) respond to the Wisconsin Department of Natural Resources (DNR) with detailed information as to the disposal of hazardous substances at the

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[1]Codified, as amended, at 42 U.S.C. §§ 9601-9675 (1988), commonly referred to as Superfund.

site from 1950 to 1984.[2] On July 7, 1989, the city forwarded EPA's letter to its insurer, General Casualty Company of Wisconsin, and advised: "[w]e are insisting that you accept tender of coverage immediately and ... request that you retain independent expert counsel for the City of Edgerton to represent the City in this matter."

General Casualty also insured ES&G against liability for property damage and personal injury arising out of its ownership and use of the landfill.[3] On July 20, 1989, ES&G

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[2]EPA's letter stated:

> The United States Environmental Protection Agency (U.S. EPA) is presently investigating the circumstances surrounding the presence of hazardous substances in and around the Edgerton Sand & Gravel Site in Rock County....
>
> Pursuant to the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. [sec.] 9604(e), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 [SARA], and pursuant to Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. [sec.] 76927, you are hereby requested to respond to the following Information Requests. Compliance with the following Information Requests is mandatory....

[3]General Casualty provided primary general liability coverage of the landfill to ES&G for the policy periods January 1, 1984, to January 1, 1985 and January 1, 1985, to January 1, 1986. It provided primary general liability coverage to the city for the policy year beginning April 1, 1982, and each year thereafter to April 1, 1986. However, ES&G and

forwarded EPA's letter to General Casualty and requested that it provide ES&G with defense coverage and pay any costs ES&G "may have regarding this site."

By certified letter dated February 27, 1990, DNR gave the PRPs thirty days to propose a PRP-implemented remediation work plan to clean up the site and remediate the environmental problems associated with the site, or face listing of the site on CERCLA's National Priorities List (NPL), or state action.[4] On April 23, 1990, ES&G notified its excess liability insurer, Aetna Casualty and Surety Company, that ES&G had received EPA's Information Request letter and DNR's enforcement letter of February 27, 1990. ES&G requested that Aetna accept coverage of defense costs and any liability ES&G might incur as a result of EPA's and DNR's potential claims. General Casualty and Aetna denied coverage and refused to provide ES&G and the city with a defense.

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the city agree that General Casualty's policies commencing after 1984 do not provide coverage. Iowa National Mutual Insurance Company provided ES&G with primary comprehensive general liability coverage from January 1, 1973, to January 1, 1984, and the city with primary comprehensive general liability coverage from April 1, 1977 through April 1, 1981. However, Iowa National is insolvent. Aetna provided ES&G with excess indemnity (umbrella) coverage from April 9, 1974, to April 9, 1977. It did not cover the city at any time.

[4]A work plan was not prepared until July 1991. FOTH AND VAN DYKE, WORK PLAN FOR LANDFILL CLOSURE AND GROUNDWATER REMEDIAL INVESTIGATION/FEASIBILITY STUDY (July 11, 1991), filed with DNR, Southern District Headquarters.

ES&G and the city began this action December 20, 1990, seeking a declaration that General Casualty and Aetna were obligated under their policies to defend them against, and indemnify them for, any liability arising out of EPA's and DNR's claims, actions or suits involving the landfill. ES&G and the city also stated a claim against General Casualty and Aetna for bad faith in refusing to provide them with a defense.

ES&G and the city filed a motion for summary judgment on March 26, 1991. On April 26, 1991, General Casualty filed a cross-motion for summary judgment claiming that no "suit seeking damages" had been filed which triggered its duty to defend. It further contended that the insureds' failure to give it timely notice of an "occurrence" or claim, as required by its policies, relieved it of any obligation to provide its insureds with coverage under its policies. It also requested that the trial court dismiss the insureds' bad faith claim. On April 29, 1991, Aetna filed a substantively identical cross-motion for summary judgment. In the alternative, General Casualty and Aetna each moved the trial court for a continuance to permit it to conduct additional discovery.

On May 10, 1991, the court granted ES&G's and the city's motion for summary judgment and denied General Casualty's and Aetna's cross-motions, except on the insureds' bad faith claims, which it dismissed. The court did not rule on General Casualty's and Aetna's motions for a continuance.[5]

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[5]Our decision moots General Casualty's and Aetna's claim that the trial abused its discretion when it failed to address their motions.

On July 18, 1991, the circuit court entered an amended judgment. General Casualty and Aetna appealed. ES&G and the city do not appeal from that part of the judgment which dismissed their bad faith claim. We affirm that part of the judgment which denied General Casualty's and Aetna's cross-motions for summary judgment and reverse that part of the judgment which granted ES&G's and the city's motion for summary judgment. We also reverse the judgment in favor of the city against Aetna because Aetna does not insure the city.

THE ISSUES

When confronted with cross-motions for summary judgment, the reviewing court must rule on each party's motion on an individual basis. Each motion must be denied if material factual issues exist as to the motion. 10A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720 (2d ed. 1983). In most respects, Wisconsin's summary judgment statute, sec. 802.08, Stats., is substantially the same as Rule 56, Fed. R. Civ. P., which governs summary judgment procedure in the federal district courts. We conclude that this construction of the federal rule is consistent with Wisconsin summary judgment methodology. We, like the federal appellate courts, review the trial court's decision by applying, just as the trial court applied, the standards and methods set forth in the summary judgment rule. *Wright v. Hasley*, 86 Wis. 2d 572, 579, 273 N.W.2d 319, 322-23 (1979).

We identify the following issues presented by the parties' motions and cross-motions:

(1) Did issuance of the June 22, 1989 PRP letters by EPA to ES&G and the city under section 104(e) of CERCLA trigger the duty of General Casualty and Aetna to defend their insureds against the Superfund initiative?[6] We conclude that the insurers' duty to defend was not triggered by the PRP letters of June 22, 1989, but arose when DNR's letter of February 27, 1990, unequivocally imposed upon ES&G and the city the responsibility to remediate and clean up the landfill or bear the expense thereof.[7]

(2) Are clean-up and remediation costs, which ES&G and the city incur in response to the Superfund initiative, sums which they are obligated to pay "as damages," within the meaning of that term as used in the insurers' policies? We conclude that they are.

(3) Do the personal injury liability coverage provisions of General Casualty's and Aetna's policies provide coverage for ES&G's and the city's liability for groundwater contamination? We conclude that "personal injury," as defined in General Casualty's and Aetna's policies, includes injury to the groundwater.

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[6]In this opinion, "Superfund initiative" refers to the administrative proceedings begun by EPA's section 104(e) CERCLA letter and includes DNR's environmental repair efforts under secs. 144.442 and 144.442(8), Stats. Under sec. 144.442(8), DNR may advise, consult, assist and contract with any interested person to implement the federal Superfund Act. It may also contract directly with EPA.

[7]When we refer to clean up or remediation of the landfill or the site, we include the environmental problems associated with the site which may have been, or are, encountered off-site.

(4) Do General Casualty's policies exclude coverage because ES&G and the city expected or intended that contaminants would leach into the groundwater from the landfill? We conclude that General Casualty's basic policy's "expected" or "intended" exclusions do not apply to personal injury liability coverage under Coverage P, applicable to ES&G, or to the Broad Form Extended Liability Coverage Endorsement, applicable to the city. Because coverage of groundwater contamination is provided under the personal injury liability coverage provisions, we need not consider whether coverage for property damage liability is excluded by provisions of General Casualty's basic policy.

(5) Was coverage under the insurers' policies triggered during a policy period? Because the question of the appropriate trigger of coverage for personal injury liability has not been briefed and the need to answer that question may be obviated by the evidence at trial, we do not reach this issue.

(6) Is the cost of cleaning up and remediating the landfill site itself excluded from coverage under the policies' owned-property exclusion? We conclude that where, as here, the purpose of remedial work on the insured's property is to repair or prevent environmental damage, the cost of such work is not excluded by the owned-property exclusion.

(7) Is any party entitled to summary judgment on the question of whether General Casualty and Aetna were prejudiced by the insureds' untimely notice of an "occurrence" or claim? We conclude that there is a genuine issue of material fact as to whether General Casualty and Aetna were

prejudiced by ES&G's and the city's untimely notices, which precludes the grant of summary judgment to any party.

(8) Has the policy limit of Iowa National's underlying policy been exhausted by payments by ES&G so that Aetna's duty to defend has been triggered? Did ES&G and the city attempt to insure a known loss when they contracted with General Casualty? We conclude that these are issues for trial.

I.

SUPERFUND INITIATIVE AS "SUIT"

General Casualty's policies[8] provide: "[T]he company shall have the right and duty to defend any *suit* against the insured *seeking damages* on account of ... bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent...." (Emphasis added.) Coverage P for Personal Injury Liability, contained in ES&G's policy and General Casualty's Broad Form Extended Liability Coverage Endorsement for personal injury liability applicable to the city, contain substantively identical language.

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[8]General Casualty's policies are standard-form comprehensive general liability (CGL) insurance policies developed for the insurance industry by the Insurance Services Office and its predecessor agencies. For a general discussion of the development of CGL policies, see 7A JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE, § 4491 (1979 & Supp. 1991); *see also* MITCHELL L. LATHROP, INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS ch. 3, General Liability Insurance (1992) (hereinafter ENVIRONMENTAL CLAIMS INSURANCE). Aetna's excess liability policy differs in some material respects from the standard-form CGL.

Aetna's policy provides: "The company shall defend any *suit seeking damages* which are not payable on behalf of the insured ... because of exhaustion of an underlying aggregate limit of liability by payment of claims...." (Emphasis added.)

General Casualty and Aetna argue that the Superfund process did not commence a "suit" against their insureds because the term "suit" "[i]n plain language refers to court proceedings."[9] The traditional view is that a mere claim against the insured is insufficient to trigger the duty to defend. Thomas A. Gordon and Roger Westendorf, *Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures*, 25 IDAHO L. REV. 567, 609 (1988-89). The authors state:

> Until a "suit" was filed, the courts were reluctant to recognize an obligation by the insurer to defend. More recent decisions, however, have broadened the word "suit" to include any adjudicatory proceeding before an administrative or quasi-judicial forum. *Courts considering the issue of whether a notice letter to PRPs from a federal or state regulatory agency pursuant to environmental statutes*

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[9]The Insurance Services Office's Occurrence-Commercial General Liability policy, effective January 1, 1986, which replaced the standard-form CGL policy, defines "suit" to "mean[] a civil proceeding in which damages ... to which this insurance applies are alleged...." DONALD S. MALECKI AND ARTHUR L. FLITNER, THE NEW CLAIMS-MADE AND OCCURRENCE FORMS, COMMERCIAL GENERAL LIABILITY 11-12 (2nd ed. 1986).

> *triggers the existence of a duty to defend have reached opposite conclusions.*

Id. at 609-10 (citations omitted; emphasis added).

Those courts which have held that a duty to defend is not triggered by federal or state administrative environmental initiatives have applied to the word "suit" a "plain language" rule. Representative of the decisions of those courts is *Arco Indus. Corp. v. Travelers Ins. Co.*, 730 F. Supp. 59 (W.D. Mich. 1989). There, the court said:

> In this case, the insurance contract limits the duty to defend to those instances where the insured is the subject of a "suit." While the contracts do not define the term "suit," that term has a well-accepted ordinary meaning. In plain language, the term refers to court proceedings.

Id. at 66.[10]

The "plain-language" courts frequently cite a dictionary definition of "suit": "an action or process in a

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[10]The federal court for the Eastern District of Michigan predicted that the Michigan Supreme Court would arrive at a contrary conclusion. *Higgins Indus., Inc. v. Fireman's Fund Ins. Co.*, 730 F. Supp. 774, 776-77 (E.D. Mich. 1989). However, the Sixth Circuit Court of Appeals predicted that the Michigan Supreme Court would conclude that a PRP letter does not trigger an insurer's duty to defend. *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 762-64 (6th Cir. 1992). The court held that "suit" had a plain and unambiguous meaning that excluded the PRP letter in that case.

court for the recovery of a right or claim." *A.Y. McDonald Indus. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 627 (Iowa 1991) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2286 (P. Gove ed. 1961)). Other courts, however, have pointed out that "suit" has a second, broader meaning: "the attempt to gain an end by a legal process." *Id. McDonald* lists decisions which have given "suit" a broad definition, and other decisions which have adopted a narrow definition. *Id.* at 627-28 nn. 9-10. Those courts which have interpreted "suit" broadly have considered that proceedings under both federal and state antipollution laws may be lengthy and complex, and government policy is to accomplish cleanup quickly and without judicial intervention if possible. Annotation, *Liability Insurance Coverage for Violations of Antipollution Laws*, 87 A.L.R. 4th 444, §2(b) (1991 Supp. 1992).

We disagree with those courts which have found that the word "suit," contained in the standard-form CGL policy, unambiguously requires the initiation of court proceedings before the duty to defend is triggered. We also disagree with those courts which hold that the mere receipt of a PRP letter from EPA or a state environmental protection agency causes the duty to defend to arise. We conclude that the duty to defend arises when a federal or state environmental agency identifies a PRP which it unequivocally requires to pay the cost of, or participate in paying the cost of, landfill remediation and clean up. We adopt the reasoning of the court in *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731 (1st Cir. 1990).

In *Ryan*, the owner of a site contaminated by hazardous chemicals had what the court termed "somewhat

desultory correspondence" with the New York Department of Environmental conservation regarding closure and cleanup of the site. It sued its insurer, Rural Insurance, for Rural's failure to defend and indemnify it according to the tenor of a series of insurance policies. The court said that the issue was whether the New York Court of Appeals would treat this correspondence as the functional equivalent of a "suit" sufficient to trigger the duty to defend under the policies. The court concluded that it would not. It concluded that an insurer's duty to defend would be determined according to the following principles:

> To sum up, the origins and purpose of the duty to defend seem best accommodated neither by a restrictive suit-cum-judgment rule nor by an expansive "any contact with a government agency is enough" rule, but by focusing instead on the data most relevant to the probability of actual toxic waste liability: coerciveness, adversariness, the seriousness of the effort with which the government hounds an insured, and the gravity of imminent consequences. Since the law holds PRPs to so strict a liability standard, the degree of compulsion the government wields in pursuing an insured seems an apt proxy for measuring factual expectancy according to the actual probability and immediacy of toxic waste liability.

Id. at 741.[11]

General Casualty and Aetna argue that EPA exerted no compulsion by its PRP letter of June 22, 1989,[12] and that DNR's letters were merely invitations to voluntary action. We agree that EPA's Information Request letter of June 22, 1989, did not trigger a duty to defend. Such requests under section 104(e) of CERCLA are, as its title states, "Information Gathering." However, EPA and DNR proceeded beyond the "information gathering" stage. On November 6, 1989, DNR forwarded to ES&G the responses the department received to the section 104(e) letter "as an opportunity for you and the other potentially [responsible] parties to reach an agreement between yourselves on remediating the environmental problems at the landfill."

On February 27, 1990, DNR notified ES&G by certified letter that, "[A] legally enforceable contract between the Department and the PRP's must be signed within 60 days after a PRP workplan is submitted to the Department, to ensure that the work is completed properly and on schedule." Immediately thereafter, on March 9, 1990, ES&G invited the city "and others" to a meeting to discuss: (1) insurance

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[11] *Ryan* was followed in *Colonial Tanning Corp. v. Home Indem. Co.*, 780 F. Supp. 906 (N.D.N.Y. 1991).

[12] General Casualty also claims that there is nothing in the record to show that the city received EPA's letter. General Casualty is wrong. Mary Harding, an attorney representing the city, incorporated in her affidavit the city attorney's letter of July 7, 1989, to General Casualty specifically referring to and enclosing a copy of EPA's June 22 letter.

coverage at the site, (2) formation of a joint defense group, and (3) formulating a response to DNR's demands.

On February 8, 1991, DNR's Bureau of Legal Services notified ES&G that "unless a PRP group signs a contract with WDNR for this site by May 31, 1991, WDNR will request that this site be listed on the NPL." The bureau warned that if that occurred, EPA would attempt to negotiate Administrative Consent Orders with the PRPs. If unsuccessful, EPA could issue an order requiring the PRPs to undertake clean up and remediation, or undertake the action itself and sue the PRPs to recover its costs, or EPA could seek forfeitures and treble damages from the PRPs for noncompliance.[13]

DNR's letter informed ES&G that its experience had been "that work done under contract with WDNR goes much quicker, is less complex and less costly than work done on NPL sites." DNR emphasized that a contract with it was the "*only* mechanism acceptable to WDNR" to prevent listing the site on the NPL.[14] On September 12, 1991, ES&G, the city,

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[13]The response actions which EPA may take under Superfund include: removal of hazardous substances and remediation, 42 U.S.C. § 9604(a); any other measure consistent with the national contingency plan EPA considers necessary to protect the public health or welfare of the environment, 42 U.S.C. § 9605; abatement, 42 U.S.C. § 9606(a); and recovery of costs and damages, 42 U.S.C. § 9607.

[14]For a description of the purpose and implementation of the National Priorities List, see 57 Fed. Reg. 47,190 (Oct. 14, 1992), to be codified at 40 C.F.R. Part 300. As of October 14, 1992, final and proposed NPL sites totalled 1,236, including forty in Wisconsin. *Id.* at 47,201. To date, EPA has completed approximately 33,000 Preliminary Assessments and

and other PRPs entered into a contract with DNR pursuant to sec. 144.442, Stats., and CERCLA to investigate the site conditions and remediate the landfill.[15]

The PRPs' election to participate in the Superfund process was voluntary only in the sense that they could have elected not to contract with DNR. However, the acknowledged consequences of that election were NPL listing followed by EPA clean up and assessment of the costs to the PRPs, possible fines, and probable DNR action if the site could not be cleaned up quickly enough under the Superfund Program.[16] DNR's letter of February 27, 1990, stated: "Quick resolution of the problems associated with the site is the Department's main objective" The PRPs' choice was Hobson's.

We adopt the following statement of the *Ryan* court:

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approximately 16,000 Site Inspections. *Id.* at 47,183. Lathrop states that "[s]uggestions have been made that there may be as many as 450,000 potential NPL sites throughout the country." ENVIRONMENTAL CLAIMS INSURANCE § 1.03[2] at 1-14 n. 12.

[15]The contract was pending when the amended judgment was entered July 18, 1991. We take judicial notice of the executed contract and appended work plan which is found in the files of the Environmental Response and Repair Section of the Solid Waste and Hazardous Waste Management Division of DNR (Southern District Headquarters), Edgerton Sand & Gravel Landfill, Contract SF-91-02. *See* sec. 902.01(3), Stats.; George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 38, 43-45 (1960).

[16]DNR may initiate environmental repair directly under sec. 114.442, Stats.

> If government assumes an adversarial posture, making sufficiently clear that the force of the State will be brought promptly to bear in a way that threatens the insured with probable and imminent financial consequences, then the functional equivalent of a suit may be in progress and the insured might reasonably expect the insurer to defend.

Ryan, 916 F.2d at 741.

In this case, EPA and DNR assumed an adversarial posture toward ES&G and the city, making very clear that failure of ES&G and the city to contract with DNR to remediate and clean up the landfill would inevitably lead to devastating financial consequences for them.[17] ES&G and the city could reasonably expect that their insurers would defend them against the government's coercive actions. The degree of compulsion wielded by EPA and DNR against ES&G and the city is an "apt proxy" for measuring ES&G's and the city's expectation of liability.[18] We mark the degree

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[17]"What is obvious is that no matter which enforcement vehicle an environmental regulatory agency elects to use to achieve remediation of a contaminated site, those adjudicated to have been responsible for the creation of the contamination will sooner or later be asked to pay." ENVIRONMENTAL CLAIMS INSURANCE § 3.03(2) at 3-17.

[18]General Casualty argues that the city may have been treated differently from other PRPs, citing the Interim Municipal Settlement Policy, 54 Fed. R. 51, 071-72 (1989). The record does not support General Casualty's claim. Throughout, the degree of compulsion wielded by EPA and DNR against the city has been the same as that wielded against the other PRPs.

of compulsion which triggered the insurers' duty to defend as being reached upon receipt of DNR's certified letter of February 27, 1990.[19]

II.

SUPERFUND RESPONSE COSTS AS DAMAGES

The duty of an insurer to defend a "suit" is not triggered, however, unless the suit seeks "damages." "[A]bsent the possibility that money damages might be awarded, the insurer would have no duty to defend." *School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis. 2d 347, 366, 488 N.W.2d 82, 88 (1992). While the duty to defend is broader than the duty to indemnify, the insurer has no duty to defend an insured in a "suit" in which the insurer has no economic interest. *Id.* at 364, 488 N.W.2d at 87-88 (citing 7C JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (1979 & Supp. 1992)). Thus, we must consider whether General Casualty and Aetna have an economic interest in the Superfund initiative. They argue that they do not have such an interest because their policies limit coverage to "sums which the insured shall become legally obligated to pay *as damages.* (Emphasis added.) General Casualty and Aetna contend that Superfund remediation and clean-up costs are not "damages" because those costs are incurred in response to claims for injunctive or restitutionary relief.

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[19]However, Aetna's duty to defend is not triggered until the policy limit of the underlying insurance is exhausted. On the record available to us, we cannot determine whether or when that occurred. That determination shall be made on remand.

In *School Dist. of Shorewood*, the court said that a classification based on the form of the action, as either equitable or legal, is irrelevant. "Where the parties have contracted to limit recovery to a specific quantifiable type of remedy [e.g., damages], a court should not alter the insurance contract to include other types of remedies not contracted for...." *Id.* at 369, 488 N.W.2d at 89. The plaintiffs sought declaratory and injunctive relief to remedy inequality of educational opportunity by requiring the defendants to correct racially discriminatory practices. *School Dist. of Shorewood* simply stands for the proposition that "[t]he term 'damages' does not encompass the cost of complying with an injunctive decree." *Id.* at 368, 488 N.W.2d at 82. The court said: "An injunction looks to the future conduct of the parties and is preventive in nature. Damages, on the other hand, are remedial in nature, not preventive." *Id.* at 370, 488 N.W.2d at 90. The *School Dist. of Shorewood* court said that:

> "Damages" as used in these insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature. The term "damages" does not encompass the cost of complying with an injunctive decree.

Id. at 368, 488 N.W.2d at 89.

The court said that "in the insurance context, the term 'damages' has an accepted technical meaning in law."[20] *Id.*

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[20] *See Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979 (4th Cir. 1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Mraz v. Canadian Universal*

at 368 n.6, 488 N.W.2d at 89 n.6. Therefore, we may not rely on those cases from other jurisdictions which have concluded that the term "damages" in the standard-form CGL policy is ambiguous. However, we conclude that Superfund response costs fall readily within the compass of "legal damages."[21]

The Superfund initiative to which ES&G and the city are subject does not look solely to the future conduct of ES&G and the city; it looks to conduct which has already caused injury and will continue to cause injury unless the

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Ins. Co., 804 F.2d 1325 (4th Cir. 1986); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 741 F. Supp. 298 (D. Mass. 1990), *aff'd*, 933 F.2d 66 (1st Cir. 1991); *Verlan, Ltd. v. John L. Armitage and Co.*, 695 F. Supp. 950 (N.D. Ill. 1988); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990). *See also* decisions collected in *Minnesota Mining & Mfg. v. Travelers Indem.*, 457 N.W.2d 175, 180 n. 5 (Minn. 1990).

[21] *School Dist. of Shorewood* does not require a contrary conclusion. The school districts cited to the court many CERCLA cases holding that Superfund clean-up costs constitute "damages" under the terms of insurance policies. The court noted the disagreement among courts as to whether clean-up costs under Superfund constitute "damages." The court said:

> The issue of whether clean-up costs constitute "damages" under the terms of an insurance contract has never been addressed by a Wisconsin court. Such an important issue should not be decided in a cursory fashion by this court. Therefore, we decline to adopt or apply the analogy posited by the school districts.

170 Wis. 2d at 374, 488 N.W.2d at 91.

cause of the injury is eliminated. To the extent that the Superfund initiative will remediate an ongoing injury to the environment, it is preventive. However, the "damages" which ES&G and the city must pay are not confined to future injuries but include "legal recompense for injuries sustained." *School Dist. of Shorewood*, 170 Wis. 2d at 372, 488 N.W.2d at 91.

In this respect, the following statement of the court in *Upjohn Co. v. Aetna Casualty and Sur. Co.*, 768 F. Supp. 1186, 1199-1200 (W.D. Mich. 1990),[22] expresses a common sense approach, which we adopt:

> [O]nce property damage is found as a result of environmental contamination, clean-up costs should be recoverable as sums that the insured was liable to pay as the result of property damage. In this context the argument concerning the historical separation of damages and equity is not convincing ... the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely third parties. While such claims might be characterized as seeking "equitable

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[22] *Upjohn* quoted from *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988), *vacated and dismissed*, 132 F.R.D. 660 (W.D. Mich 1990), *aff'd*, 955 F.2d 1085 (6th Cir. 1992) (Upon petition for realignment of the parties, the court concluded it no longer had jurisdiction based on diversity).

> relief," the clean-up costs are essentially compensatory damages for injury to common property and for that reason the insured has a duty to defend.... [T]he short answer is that from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.[23] [Citations omitted.]

The legal-equitable distinction to which the *Upjohn* court refers has been rejected by a majority of the courts which have considered whether site remediation and clean-up costs incurred in response to coercive government action are amounts paid by the insured as "damages" under a standard-form CGL insurance policy. *See* numerous decisions collected in *Minnesota Mining & Mfg. v. Travelers Indem. Co.*, 457 N.W.2d 175, 180-81, n.6 (Minn. 1990); *see also Village of Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co.*, 775 F. Supp. 718, 726 n. 10 (D. Vt. 1991). In *Village of Morrisville*, the court concluded that the "clear majority of courts" have held that CERCLA clean-up costs are "damages" under CGL insurance policies.[24] 775

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[23]In Part III we conclude that migration of VOCs from a landfill into the groundwater is an invasion of the right of private occupancy, a "personal injury" under General Casualty's and Aetna's policies. The statement of the *Upjohn* court as to property damage applies with like force to personal injury.

[24]Lathrop states that '[s]ince 1990, most courts that have considered the question have held that the costs of cleaning up environmental damage, costs connected with CERCLA or state statutes, are covered by the CGL

F. Supp. 718, 725-26. *See also Wagner v. Milwaukee Mut. Ins. Co.*, 145 Wis. 2d 609, 613 n.3, 427 N.W.2d 854, 856 n.3 (Ct. App. 1988), *overruled on other grounds, Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 759, 456 N.W.2d 570, 578 (1990).

In *Minnesota Mining & Mfg.*, the federal district court asked whether, under Minnesota law, the costs of complying with directives issued by state and federal environmental agencies to clean up groundwater contamination caused by pollution were covered under the insureds' CGL insurance policies. 457 N.W.2d 175, 176-77. The Minnesota Supreme Court concluded that such costs were covered.

The court noted that liability for groundwater contamination had been recognized in Minnesota for many years. *Id.* at 183. Thus, the insured and the insurers were aware of the potential liability for groundwater contamination at the time they entered into the insurance contracts in question. The court said that the advent of environmental protection statutes "[has] merely changed the form of the liability for ground water pollution, not the nature of that liability." *Id.*

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insuring agreement which pays 'all sums which the insured shall become legally obligated to pay as damages.'" Environmental Claims Insurance § 3.03[4] at 3-26 n.50 (citing numerous decisions). Lathrop lists the following states as rejecting the "as damages" defense or which would follow the trend of the majority: California, Colorado, Delaware, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Vermont, Washington, and Wyoming. The "as damages" defense continues to be viable in Maine, Maryland, New Hampshire and New York. *Id.*

Likewise, Wisconsin has recognized for many years that one who causes groundwater contamination may be liable therefor. *Anstee v. Monroe Light & Fuel Co.*, 171 Wis. 291, 177 N.W. 26 (1920) (utility plant liable for contamination of adjoining landowner's soil and well). When the parties to this action contracted for comprehensive general liability insurance, it was within their reasonable expectation that coverage would extend to damages caused by groundwater contamination.[25] We agree with the Minnesota court that environmental protection statutes have not changed the nature of such liability but only the form. We conclude that the insurer may not escape liability for a risk it has insured simply because it is the government rather than a private party which demands that the person responsible repair environmental damage.

Indemnity for sums the insured becomes obligated to pay for causing injury to the groundwater is within the reasonable expectation of an insured operating or using a solid waste landfill. The ultimate test in construing an insurance contract is not what the insurer intended the words of the contract to mean, but what a reasonable person in the position of an insured would have understood the words to mean. *Herwig v. Enerson & Eggen*, 98 Wis. 2d 38, 40, 295 N.W.2d

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[25]When General Casualty wrote its policies, several environmental laws were in place imposing potential liability on operators and users of sites at which toxic wastes had been disposed. The federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991, was enacted in 1976. CERCLA became effective December 11, 1980. the Wisconsin Hazardous Waste Management Act and its hazardous substance spills legislation were enacted by ch. 377, Laws of 1977. The environmental repair legislation was enacted by sec. 63, 1983 Wis. Act 410.

201, 203 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 170, 303 N.W. 2d 669 (1981) ("The test of coverage is what a reasonable person in the position of the insured would have believed to be covered...."). ES&G and the city could reasonably have understood that the term "damages" in the policies before us included injury to the groundwater caused by their operation and use of the landfill.

We adopt the reasoning of those courts which have held that costs incurred to prevent future pollution damage of a kind which has already occurred constitute "damages" within the meaning of the standard-form CGL policy. In *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1190 (N.D. Cal. 1988), *aff'd in part; rev'd in part on other grounds*, 952 F.2d 1551 (9th Cir. 1991), the court pointed out that when the parties negotiated the insurance contract, neither party anticipated claims for investigation and clean-up costs under CERCLA.[26] However, what the parties did contemplate was that if Intel became legally obligated to pay damages to a third party because of property damage inflicted by Intel, the insurance carrier would indemnify Intel. The court concluded that as a PRP, Intel was legally obligated to pay all costs associated with cleanup of the subject property. The court therefore held that Superfund response costs constituted "damages" within the reasonable and normal

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[26]The Sixth Circuit Court of Appeals suggests that CERCLA's PRP approach may represent "a unique legal creation, with no true parallel in any other area of administrative law." *Ray Indus. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 764 (6th Cir. 1992). We agree with the *Ray* court that that fact does not justify deviating from the plain language of an insurance contract. But that fact also does not justify construing an insurance contract strictly to frustrate the normal expectations of the insured.

expectations of the parties. *Id.* at 1189-90. Other decisions reaching the same conclusion are collected in the Annotation, *Liability Insurance Coverage for Violations of Anti-Pollution Laws*, 87 A.L.R. 4th 444, § 5 at 483-85 (1991 & Supp. 1992).

We further conclude that faced with the consequences of inaction, ES&G and the city had a duty to the insurers to mitigate their damages by contracting with DNR to clean up and remediate the landfill. ES&G and the city could have refused to contract with DNR or otherwise respond to the Superfund initiative. Inevitably, the clean-up and remediation work would have been done by EPA or DNR or settling responsible parties, who would have sued ES&G and the city for their share of the costs.

DNR stated that its experience had been that if the necessary work is done by EPA, the cost will be significantly higher than if the work is done under a DNR contract. Insureds have a duty to mitigate damages for the insurers' benefit, either under cooperation clauses such as those contained in the insurers' policies, or under common-law doctrine.[27] 18 Couch on Insurance § 74:645 (2d ed. 1983 & Supp. 1992) ("[I]t is the duty of the insured to do all that he reasonably can to minimize the loss, and a failure to take reasonable care to avoid an increase of the loss may defeat a recovery."). *See Howard v. State Farm Mut. Auto. Liab. Ins. Co.*, 70 Wis. 2d 985, 993, 236 N.W.2d 643, 647 (1975) ("[T]he general rule does require the damaged party to use reasonable efforts to mitigate the damages."). *See also*

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[27]General Casualty and Aetna allege as affirmative defenses to this action that ES&G and the city may have failed to mitigate their damages.

Metalmasters of Minneapolis, Inc. v. Liberty Mut. Ins. Co., 461 N.W. 2d 496, 501 (Minn. App. 1990) ("Mitigation is a duty the insured performs for the insurer's benefit. Mitigation cost is recoverable so long as it is reasonable and less than the damages would have been without it.").

For the foregoing reasons, we conclude that the term "damages," as used in the policies before us, includes the costs incurred by ES&G and the city in responding to the Superfund initiative.

III.

PERSONAL INJURY LIABILITY COVERAGE

The insurers' policies promise to pay on behalf of the insureds all sums which they become legally obligated to pay as damages because of "personal injury."[28] "Personal injury" is defined to include "wrongful entry or eviction or other invasion of the right of private occupancy." General Casualty and Aetna argue that each of these torts "requires an unprivileged taking of real property from a person claiming a possessory interest." We disagree.

In *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 676, 476 N.W.2d 593, 608 (Ct. App. 1991) (citing Comment, *Liability of Landowner for Pollution of Percolating Waters*, 39 MARQ. L. REV. 119, 130 (1955)), we held that "[c]hemicals seeping or percolating through groundwater can

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[28]General Casualty provides coverage to ES&G for personal injury liability through a Coverage P addition to the CGL policy and to the city through a Broad Form Extended Liability Coverage Endorsement.

constitute an invasion" of another's interest in the private use and enjoyment of land. We concluded that under section 822(b) of the RESTATEMENT (SECOND) OF TORTS, "a negligent invasion may be the basis of liability under a private nuisance theory." *Id.* We also held that the intrusion of VOCs into well water may constitute an actionable negligent trespass. *Id.* at 677, 476 N.W.2d at 608 (citing RESTATEMENT (SECOND) OF TORTS § 165 (1965)). None of these "offenses" require dispossession of the land owner.

There is little decisional authority as to whether pollution of another's property "invades" the landowner's right of private occupancy, within the meaning of that term as used in general liability insurance policies. In *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 273 (1st Cir. 1990), the court held that allegations that noxious odors, noise and light emanating from the city's sewage plant unreasonably interfered with the plaintiffs' use of their homestead stated a claim for coverage for liability arising from an "other invasion of the right of private occupancy." In *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co. and International Ins. Co.*, No. 91-3285, 1992 U.S. App. Lexis 23790 (7th Cir. 1992) (GENFED library, Current file), the court held that negligent conduct which polluted another's property and led to a seal order and imposition of an environmental reclamation lien arguably constituted an "other invasion of the right to private occupancy." In *Pipefitters* the court rejected the insurers' claim that there could be no coverage unless the insured intended to dispossess the landowner of his or her right of occupancy.

In each of these cases, the right invaded was clearly the right of *private* occupancy. The insurers argue that

groundwater is public property and therefore contamination of the groundwater cannot constitute invasion of the right of *private* occupancy. We recognize that sec. 144.01(19), Stats., defines "waters of the state" to include groundwater. The state has not, however, denied landowners their historic rights of access to and use of the groundwater for agricultural and domestic uses. At one time in the history of our country, the right of a landowner to use underground water for private purposes was so jealously protected that pollution of a neighbor's groundwater by the landowner's use of percolating waters beneath the surface of the landowner's land was regarded as *damnum absque injuria*, that is, a loss without an injury. Comment, 39 MARQ. L. REV. at 120-24.

The right of a landowner to obtain groundwater for agricultural and domestic uses is recognized and protected in Wisconsin by statute. Landowners may obtain a supply of groundwater by boring or drilling a private well. *See, e.g.*, sec. 144.027(1)(c)-(h), Stats. The legislature has provided compensation, subject to an income limitation, to the owner of a contaminated private well to treat or replace the water source. Section 144.027(7), Stats.

We conclude that access to, and use of, an undefiled underground water supply is a right of private occupancy. The invasion of that right is a personal injury, liability for which is covered by General Casualty's and Aetna's policies.

IV.

DAMAGE "NEITHER EXPECTED NOR INTENDED"

General Casualty argues that its policies do not provide coverage to ES&G and the city because they "expected" or "intended" to discharge contaminants from the landfill into the groundwater. General Casualty identifies two policy provisions which, it argues, exclude coverage where the insured expects or intends the act which causes damage: the "occurrence" definition and the pollution exclusion clause. However, by their terms, these provisions apply to bodily injury and property damage liability coverage and not to personal injury liability coverage.[29] General Casualty argues, however, that the pollution exclusion clause and "other terms" of its basic policy "carry over" and apply to personal injury liability coverage under Coverage P and the Extended Liability Coverage Endorsement. General Casualty points out that while Coverage P is not part of ES&G's basic policy, it is attached to the policy "to complete said policy." Also, the endorsement to the city's policy "forms a part of the policy" and "modifies such insurance."

General Casualty's "carry over" argument would be more persuasive if Coverage P and the endorsement did not contain their own definitions and exclusions. Personal injury liability coverage is not triggered by an occurrence, but by an "offense [which] is committed during the policy period." Coverage P and the endorsement do not include a pollution

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[29]"Bodily injury" as used in the policies refers to a physical injury. "Personal injury" includes torts against personal rights, which may or may not include physical injury.

exclusion. Moreover, application of an "expected or intended" exclusion to personal injury liability coverage would have the nonsensical result of making coverage illusory. Plainly, personal injury liability coverage is extended in Coverage P and the endorsement to intentional acts: false arrest, malicious prosecution, defamation, wrongful entry or eviction or other invasion of private occupancy rights. It would be an unreasonable construction of the policies to conclude that a coverage clause is wholly nullified by an exclusion clause. Insurance contracts should be given a reasonable interpretation and not one which leads to an absurd result. *Olguin v. Allstate Ins. Co.*, 71 Wis. 2d 160, 165, 237 N.W.2d 694, 697 (1976).

We conclude, therefore, that because coverage for liability for groundwater contamination is extended to ES&G in Coverage P and to the city in the Extended Liability Coverage Endorsement through personal injury liability coverage, we need not consider whether coverage for that liability under the property damage clause would be excluded if ES&G and the city expected or intended to discharge contaminants into the groundwater.

V.

TRIGGER OF COVERAGE

We decline to decide whether the trial court correctly concluded that "[t]here is a continuous trigger of coverage for the policies of insurance issued by Aetna and General Casualty." First, the parties have not briefed the question whether the continuous trigger of coverage theory applies where the claim is for liability for personal injury. Second,

the evidence at trial may obviate the need to decide this difficult question of law.

General Casualty disagrees with the continuous trigger approach adopted by the trial court, but claims that the record is insufficient to permit any intelligent discussion of the issue. Aetna argues that coverage under its policy is triggered only by an "injury-in-fact." The injury-in-fact theory holds that the policy in force at the time the claimant suffers actual injury is the policy which must respond. ENVIRONMENTAL CLAIMS INSURANCE § 6.04[4] at 6-16. Aetna argues there was no actual injury in this case until VOCs reached the groundwater. It contends that there is a genuine issue of fact as to whether that occurred during its policy period.

ES&G and the city support the trial court's conclusion by citing *Wisconsin Elec. Power Co. v. California Union Ins.*, 142 Wis. 2d 673, 419 N.W.2d 255 (Ct. App. 1987) (*WEPCO*). In *WEPCO* we held that there was a continuous period of exposure from the time a defective power supply was installed at a dairy farm until the emission of stray voltage was corrected. We said that a reasonable interpretation of the definition of "occurrence" was that "as long as there is harmful exposure to dangerous conditions, the occurrence is continuing." *Id.* at 681, 419 N.W.2d at 258. ES&G and the city contend that VOC contamination of the groundwater was a continuous process which began when the first solvents containing VOCs were disposed of in the landfill and continued as more and more solvents were disposed of and migrated through the sand, soil and rock. Because Aetna's policy was in effect during this continuous process, they argue that coverage was triggered as a matter of law.

WEPCO was a property damage case. "The 'trigger of coverage' issue may be resolved differently depending upon the type of injury or damage that was suffered by the underlying claimant." ENVIRONMENTAL CLAIMS INSURANCE § 6.01 at 6-4. It was easy to conclude in *WEPCO* that the emission of stray voltage was a "single injurious process." *WEPCO* at 681, 419 N.W.2d at 258. The stray voltage was emitted from the power supply from the time the supply was installed until the problem was corrected. The continuous trigger theory does not lend itself as readily to potential personal injury liability resulting from toxic torts and environmental claims.

Here, for example, it is necessary to ask whether an "invasion of the right of private occupancy" occurred when the groundwater was contaminated by percolating pollutants, or when waste containing VOCs was first disposed of in the landfill. The parties have not cited us any case applying the continuous trigger of coverage theory to a personal injury liability case. So far as our research discloses, the questions which must be answered in this case have not been answered by the courts. We decline to determine the appropriate trigger of coverage in this case without sufficient briefing by the parties. We believe that that briefing may be possible after all the relevant evidence is admitted at trial.

Further, the evidence at trial may obviate the need to answer this difficult legal question. The factfinder may determine after hearing the evidence that contamination of the groundwater indisputably occurred during Aetna's policy period.

VI.

OWNED-PROPERTY EXCLUSION

General Casualty's policies do not apply to property damage to property owned or used by the insured. Aetna's policy contains a similar exclusion. The insurers argue that their policies do not provide coverage for the costs involved in cleaning up and remediating the landfill itself. We disagree.

The owned-property exclusion is "more of a clarification of general liability than an exclusion." ENVIRONMENTAL CLAIMS INSURANCE § 3.08[1] at 3-107. We adopt the reasoning of those courts which have held that the owned-property exclusion does not apply where the concern is not primarily the premises of the insured, but rather the substantial harm, or risk of substantial harm, to third-party property, including natural resources belonging to the people of the state. *See* cases collected in the Annotation, *Liability Insurance Coverage For Violations of Antipollution Laws*, 87 A.L.R. 4th 444, §§ 27, 28[a] at 536-45 (1991 & Supp. 1992). *Intel* (discussed *supra*, Part II), is representative of those cases.

Intel entered into a consent decree with EPA to remediate the site at which it had stored toxic chemical solvents in an unsecured underground storage tank. Test results showed that the site was contaminated by hazardous waste solvents, both in the soil and in groundwater percolating beneath the soil.

Intel submitted to its insurer, Hartford Accident and Indem. Co., its claim for reimbursement for reasonable and necessary investigation and clean-up costs incurred by it in complying with the consent decree. Hartford denied coverage under its policy's owned, occupied or rented exclusion. The court concluded that the exclusion did not apply to Intel's response costs. The court emphasized that Intel's remediation efforts pursuant to the EPA-approved work plan were not taken "merely to restore [its] property." *Intel*, 692 F. Supp. at 1184.

As a PRP, Intel faced joint and several liability for the consequences of its contamination. The court noted that under the California Water Code all water within the state is the property of the people of the state. *Id.* at 1183. The court considered the EPA's assessment of the danger presented by Intel's disposal site was tantamount to a finding of public nuisance. The court concluded that costs incurred by Intel to abate this public danger were not excluded by Hartford's owned, occupied or rented exclusion.

In *Fortier*, we concluded that contamination of the groundwater may constitute a private nuisance. It may also constitute a public nuisance under Wisconsin law. The "waters of the state" include groundwater within the state. Section 144.01(19), Stats. It is undisputed that the federal and state governments may exercise their police powers to abate a public nuisance. This is not a case where the insured is incurring costs primarily to repair its own property. The cleanup and remediation is intended to repair the environment. We conclude that repairs to the site itself, when made as an element of a comprehensive clean-up and remediation plan designed to repair the environment, are not excluded from

coverage by an owned-property exclusion clause. *See also Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 400 (D.N.J. 1987).

VII.

UNTIMELY NOTICE

We conclude that a genuine issue of material fact exists as to whether General Casualty and Aetna were prejudiced by the insureds' untimely notices that the groundwater beneath and in the vicinity of the landfill was contaminated by VOCs possibly leaching from the landfill. The existence of that issue precludes the grant of summary judgment to any party. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473, 477 (1980). We note at the outset that there is persuasive authority that the preferred arbiter to resolve the issue of prejudice resulting from untimely notice to an insurer is the trier of fact. In *Ehlers v. Colonial Penn Ins. Co.*, 81 Wis. 2d 64, 67-68, 259 N.W.2d 718, 721 (1977), the court said that when controverted, the question of whether an insurer was prejudiced by failure to give timely notice is a question of fact for the trier of fact. Lathrop states: "To the extent that a trend can be detected, it would seem that it is shifting toward treating late notice issues as issues of fact to be resolved by the trier of fact rather than pure issues of law." ENVIRONMENTAL CLAIMS INSURANCE § 8.02[1][b] at 8-15.

Clearly, summary judgment methodology does not effortlessly embrace the prejudice issue. It is difficult for a party to an untimely-notice dispute to demonstrate a right to judgment with such clarity as to leave no room for

controversy. *Grams*, 97 Wis. 2d at 338, 294 N.W.2d at 477. General Casualty and Aetna rely principally on the failure of the insureds to give them notice of the groundwater contamination for five to six years. They argue that this failure entitles them to summary judgment as a matter of law. Although they cite decisions in which the Wisconsin Supreme Court has held that lengthy delays entitled the insurers to summary judgment, we conclude that the effect of failure to give timely notices is now governed by statute.

Section 632.26(2), Stats., which applies to liability policies provides: "Failure to give notice as required by the policy ... does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice." ES&G and the city argue that sec. 632.26(2) eliminates the rebuttable presumption that prejudice results from untimely notice, identified in *Gerrard Realty Corp. v. American States Ins. Co.*, 89 Wis. 2d 130, 140, 277 N.W.2d 863, 869 (1979). General Casualty asserts that the insureds' contention is in direct contradiction to sec. 631.81(1), Stats., which was construed in *Gerrard*. Section 631.81(1) provides that if the insured gives notice of loss as soon as reasonably practicable and within one year after the time it was required to be given under the policy, the claim is not invalidated unless the insurer shows prejudice. The *Gerrard* court said that where the claimant gave notice more than one year late, the burden of showing prejudice shifted to the claimant.

Section 631.81(1), Stats, like sec. 632.26(2), Stats., is "concerned with determining who wins when the totality of evidence is inconclusive ...." Legislative Council Note, 1979, sec. 632.26(2), Stats., Sections 631.81(1) and 632.26(2) are

not concerned with tipping the scales as to prejudice in favor of either insurer or insured.

Further, a burden-shifting statute is of little utility on summary judgment where the movant already has the burden of going forward and bears a considerable burden of persuasion. We conclude therefore that whether summary judgment may be granted on the issue of prejudice because of the insured's untimely notice is to be determined by well-settled summary judgment methodology. If we identify genuine issues of material fact, we must deny summary judgment, leaving for trial the application of any presumption and the risk of nonpersuasion.

We therefore examine the evidence to determine whether there is any genuine issue of fact as to whether General Casualty and Aetna were prejudiced by the insureds' untimely notice. General Casualty and Aetna argue that they were prejudiced by the loss of a valuable witness when the former owner of the landfill, Charles E. Sweeney, died in September 1989. General Casualty claims it has been prejudiced by failure of ES&G and the city to file timely claims with the liquidator of Iowa National because it lost the right of contribution from Iowa National. Finally, General Casualty contends that if it had known in 1984 of the groundwater contamination, it would not have continued to issue policies to ES&G and the city covering the landfill. Aetna argues that since 1984, ES&G may have allowed the contamination to intensify and spread, thus increasing the clean-up and remediation cost. Aetna also argues that, because of the excessive delay in notice, the insurers have been deprived of the opportunity to investigate the circumstances surrounding the insureds' claims.

The trial court found that there was nothing in the record to indicate that the insurers would have done anything different in 1984 than they did in 1989; that is, deny coverage and refuse to defend. The court also found that it was undisputed that records concerning the landfill and many of the witnesses to its operation were available for inspection and investigation; and studies as to the impact of the landfill on VOC groundwater contamination and necessary remedial measures were available.

We note that the waste types landfilled have been identified and the quantity estimated. *See* FOTH AND VAN DYKE, WORK PLAN FOR LANDFILL CLOSURE AND GROUNDWATER REMEDIAL INVESTIGATION/FEASIBILITY STUDY 6-7 (July 11, 1991).[30] Collection of a consistent set of indicator parameters from the groundwater began in May 1977 and included pH, temperature, conductivity, chemical oxygen demand, total hardness, chloride, iron, and sulfate. *Id.* at 7. Testing for VOC concentration began in February 1984. *Id.* The results of groundwater testing are reported in the February 1989 report by Warzyn Engineering, Inc. *Id.*

The landfill has been subject to DNR's licensing and regulatory authority since 1971. In a meeting between ES&G and DNR on February 15, 1984, the industries and major haulers who disposed of waste at the landfill were identified. ES&G has retained Warzyn Engineering since 1976 to advise

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[30]We recognize that the Work Plan was not completed when the circuit court rendered its decision. We cite the Work Plan solely to show that information as to the landfill and the groundwater is available to permit the insurers to participate intelligently in the investigation and remediation process.

it as to the design and operation of the landfill and to monitor groundwater quality. EPA made a Superfund inspection of the site in June 1984. In view of the considerable information available, the trier of fact could infer that General Casualty and Aetna have not been prejudiced by the passage of time since VOCs were first detected in the groundwater, or by the death in 1989 of the former owner and operator of the landfill, Charles E. Sweeney.

The prejudice resulting from the insureds' failure to file a timely claim in the Iowa National liquidation is, at this time, problematic. Apparently, the liquidation is not completed. General Casualty suffered no prejudice from its issuance of policies after 1984 because ES&G and the city do not claim coverage under such policies.

While each party's proof is sufficient to make a *prima facie* case for summary judgment, the countervailing evidence establishes that there exist disputed material facts which entitle the opposing parties to a trial of the prejudice issue.

VII.

"DROP DOWN" AND "KNOWN LOSS" ISSUES

A. *"Drop Down" Issue.*

ES&G and the city do not argue that Aetna's policy "drops down" to provide primary coverage because of Iowa National's insolvency. They argue, however, that they have paid sums exceeding Iowa National's underlying policy or retained limit and therefore Aetna's duty to defend has been triggered. We conclude that on the record before us, we

cannot determine whether, or when, ES&G and the city have become obligated to pay sums exceeding Iowa National's underlying policy limit. That issue shall be decided on remand.

B. *"Known Loss" Issue.*

It is fundamental that an insurer does not insure a loss which has already occurred. *Estate of Logan v. Northwestern Nat. Casualty Co.*, 144 Wis. 2d 318, 348, 424 N.W.2d 179, 190 (1988). General Casualty argues that there is a genuine issue of material fact whether ES&G and the city knew or should have known which they applied to it for liability coverage of the landfill that the groundwater was already contaminated by VOCs. We need not consider this issue because we have already concluded that there is a genuine issue of fact that precluded summary judgment in favor of ES&G and the city. *See State v. Better Brite Plating, Inc.*, 160 Wis. 2d 809, 813, 466 N.W.2d 239, 243 (Ct. App. 1991), *modified*, 168 Wis. 2d 363, 483 N.W.2d 574 (1992) (summary judgment not appropriate to define and limit issues for trial).

IX.

CONCLUSION

This case comes before us on respective motion and cross-motions for summary judgment. We affirm the trial court's denial of the insurer's cross-motions for summary judgment and reverse its grant of summary judgment to ES&G and the city. In so holding, we find that the Superfund initiative constitutes the functional equivalent of a

"suit" and expenditures for clean-up and remediation costs constitute "damages" under the terms of the insurers' policies; personal injury liability coverage provisions include injury to the groundwater, which is not excluded by the "expected" or "intended" provisions of the policies; and the owned-property exclusions do not preclude coverage for remediation of the insured's property where the purpose of such work is to stop or prevent environmental damage. We also find that a trial is necessary to decide factual issues as to the appropriate trigger of coverage; the "known loss" and "drop down" claims; and prejudice resulting from untimely notice to the insurers.

By the Court.--Judgment affirmed in part, reversed in part and cause remanded.

Recommended for publication in the official reports.

STATE OF WISCONSIN
CIRCUIT COURT ROCK COUNTY

CITY OF EDGERTON and
EDGERTON SAND & GRAVEL, INC.,

Case No. 90-CV-939

Plaintiffs,

vs. DECISION

GENERAL CASUALTY COMPANY OF WISCONSIN, WISCONSIN INSURANCE SECURITY FUND, AETNA CASUALTY AND SURETY COMPANY, HANOVER INSURANCE COMPANIES and LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

Plaintiffs Edgerton Sand & Gravel and the City of Edgerton have moved this court pursuant to Section 806.04, Stats. for a declaratory judgment that the policies of the defendant insurers cover cleanup costs of the operation or use of the landfill located at Edgerton, Wisconsin. Defendants General Casualty Company and Aetna Casualty and Surety Company were insurers of Edgerton Sand & Gravel and City of Edgerton at various times during the operation of the landfill. The insurance companies have denied coverage and refused to defend Edgerton Sand & Gravel and the City of Edgerton. The defendant insurance companies have cross-

moved for summary judgment on certain issues, including dismissal of plaintiffs' action.

Whether the complaint for declaratory judgment states a justiciable controversy ripe for judicial determination between the parties depends upon the Court's rulings with respect to several issues. A hearing was held on May 8, 1991 at which time the Court heard the arguments of counsel. Prior to the hearing, lengthy briefs were received from the parties and reviewed by the Court. Because of the urgency for a decision, I indicated I would rule on the issues without extensive elaboration. In any event, the issues involve questions of law which an appellate court would review without deference to the trial court.

1. **Were defendants' liability and excess policies triggered while volatile organic compounds were migrating into the ground water and when these compounds were discovered in the ground water?** I conclude that coverage was triggered. The use of the landfill as a disposal site for materials containing VOCs, the actual movement of the VOCs to the ground water and surrounding properties, and the discovery of the VOCs in the ground water, are all events which trigger policy coverage of the defendant insurers.

2. **Do personal injury coverage provisions apply to the migration of the VOCs constituting an invasion of the right of private occupancy by contaminating the ground water?** Ground water is considered the part of the "waters of the state." Section 144.01(19), Stats. The surrounding properties have the right to use the ground water. The migration of the VOCs into the ground water was an invasion of the private occupancy of the surrounding

properties which have rights to use of that water. I find the personal injury provisions provide coverage for damages sustained because of the migration of the VOCs into the ground water.

3. **Are the costs of remediation and cleanup sums of money the insurers are required to pay as damages because of property damage and personal injury?** I conclude that remediation and cleanup are damages covered under subject policies. The contamination of surrounding ground water constitutes a loss of use and tangible injury to property within the terms of the policies. This contamination constitutes an invasion of the interest of the surrounding land owners and private occupancy. 144.09(19). Under the subject policies, this constitutes both a personal injury and property damage.

4. **Do the defendant insurance companies have a duty to defend the plaintiffs from the demands of the WDNR and the EPA?** Of all the issues, this is the most difficult to resolve. Defendants claim no duty to defend because there has not been any "suit" filed against the insureds. While the policies do not define the term "suit," it has a well-understood ordinary meaning which is clear and unambiguous. "Suit" in this context is commonly defined "an action or process in a court for the recovery of a right or claim." *Webster's New Collegiate Dictionary*, 9th Ed., 1180 2b (1987). *Black's Law Dictionary* defines suit "any proceeding by one person or persons against another or others in a court of justice." *Black's Dictionary* 1286 (5th Ed. 1979). Thus defendants argue "suit" refers to court proceedings. It is undisputed there have been no court proceedings against either Edgerton Sand & Gravel or the

City of Edgerton in this case. Defendants cite numerous authorities in support of this position that because no suit has been filed this action should be dismissed.

However, as plaintiffs point out, the language of the subject policy should further the reasonable expectations of the insured and any ambiguity should be resolved in favor of coverage. It is clear from the correspondence from the Environmental Protection Agency and the Wisconsin Department of Natural Resources that demand has been made upon Edgerton Sand & Gravel and the City of Edgerton to take remedial action to cleanup the contamination. Plaintiffs cite a number of recent cases in support of this position, which the defense argues are strained at best. Nevertheless, because of the peculiar and unique nature of these proceedings, a broader, more liberal interpretation may be required. The letter of February 8, 1991 from Patricia M. Hanz of the Wisconsin Department of Natural Resources to Attorney John C. Martin makes the point very clear. If the potentially responsible parties do not enter into a voluntary agreement by May 31, 1991 for remediation and cleanup of the site, Edgerton Sand & Gravel and the City of Edgerton could face serious consequences. Accordingly, the nature of the claims being made require a defense now rather than waiting for the filing of civil suits in the future. I find the insurers have a duty to defend and that that duty arises herein before the filing of actual civil litigation.

5. Does the pollution exclusion contained in the policies exclude coverage or was the discharge, disbursal or escape of the VOCs sudden and accidental? This court finds that the contamination was not expected and intended and, therefore, there is coverage pursuant to the

comprehensive general liability policy issued by the defendants.

The above determinations are based upon the facts contained in the affidavits, interpretation of the General Casualty and Aetna insurance policies, the legal authorities cited, and the arguments of counsel.

Plaintiffs' motion for summary judgment is granted.

Defendants' cross-motions for summary judgment on various issues and dismissal are denied. Defendants have claimed lack of proper notice of plaintiffs' claims, arguing that notice should have been given to defendants of potential claims back in 1983 and 1984. Defendants were given notice of the claim in 1989 and denied coverage, and it's reasonable to conclude defendants would have taken the same action in 1984.

Section 632.26(2) of the Statutes provides: Effect of Failure to Give Notice. Failure to give notice as required by the policy, as modified by (1)(b), does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice. Based upon the records and evidence herein, I find no indication of any prejudice to General Casualty's investigation or its ability to investigate facts.

The issues decided herein could be decided in another way by another court and, accordingly, I find no evidence that the insurance companies acted in bad faith, and will grant to the defendants summary judgment on that issue.

Counsel for the plaintiffs is directed to prepare appropriate findings and an order for the Court's signature. Dated this 10th day of May, 1991.

BY THE COURT:

/s John H. Lussow
Circuit Court Judge

STATE OF WISCONSIN : IN SUPREME COURT

DISTRICT 4
EDGERTON, CITY v. GENERAL CASUALTY CO.,
#91-1408

IT IS ORDERED THAT THE MOTION FOR RECONSIDERATION IS DENIED WITH COSTS.

C.J. HEFFERNAN, J. ABRAHAMSON AND J. BABLITCH DISSENT.

IT IS FURTHER ORDERED THAT THE MOTION TO STRIKE PORTIONS OF MEMO IN SUPPORT OF MOTION FOR RECONSIDERATION AND THE MOTION TO FILE MEMO IN SUPPORT OF MOTION FOR RECONSIDERATION ARE DISMISSED.

Dated: October 25, 1994.

Marilyn L. Graves
Clerk of Supreme Court

No. 94-1256

Supreme Court, U.S.
FILED
FEB 21 1995

In The

Supreme Court of the United States

October Term, 1994

CITY OF EDGERTON, AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

vs.

GENERAL CASUALTY COMPANY OF WISCONSIN,
Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,
Defendant,

AETNA CASUALTY & SURETY COMPANY,
Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION FOR RESPONDENT AETNA CASUALTY & SURETY COMPANY

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QUESTION PRESENTED

Are "response costs" paid voluntarily under the supervision of the Wisconsin Department of Natural Resources, essentially equivalent to "response costs" as defined in § 107(a)(4)(A) of CERCLA, paid "as damages" pursuant to the terms of an insurance policy issued to a Wisconsin policyholder?

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I. The Wisconsin Supreme Court's decision involves primarily a question of state law and does not merit this Court's review. 6

II. There is no conflict in the circuits and state courts regarding this issue. 9

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No. 94-1256

In The

Supreme Court of the United States

October Term, 1994

CITY OF EDGERTON, AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

vs.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

BRIEF IN OPPOSITION FOR RESPONDENT AETNA CASUALTY & SURETY COMPANY

This brief is respectfully submitted by respondent Aetna Casualty & Surety Company (Aetna) in opposition to the petition for writ of certiorari filed by the joint petitioners, City of Edgerton and Edgerton Sand & Gravel Company.[1]

STATEMENT OF THE CASE

A. Aetna's Position

Respondent Aetna respectfully submits that this court should not review the decision of the Wisconsin Supreme Court. While petitioners cast the issue as one of federal statutory construction, a brief review of the Wisconsin Supreme Court's decision reveals that, in actuality, the court decided only questions of state law regarding the meaning of certain phrases, including the phrase "as damages," in an insurance policy. As such, this Court's jurisdiction is not truly invoked and this Court's attention is not merited.

B. Facts of Record

i) Introduction

Petitioners' recitation of the procedural history of this case is, for the most part, accurate. However, some of their statements regarding the facts and procedural history warrant clarification.

ii) Procedural History

The Court should note that this action was commenced by filing of a summons and complaint on December 29, 1990. On

---

1. Pursuant to Rule 29.1 of the Supreme Court Rules, Aetna Casualty & Surety Company states that it is a wholly owned subsidiary of Aetna Life & Casualty Company.

March 25, 1991, petitioners filed motions for summary judgment. (R.36). Respondents filed cross-motions for summary judgment and requested a continuance in order to conduct discovery. (R. 47, 48, 55). On May 7, 1991, one day before the summary judgment hearing, petitioners filed a 43-page reply brief and four new affidavits. (R.61). Over respondents' objections, the trial court conducted the motion hearing on May 8, 1991, and issued a written decision on May 10, 1991. (R.85). The petitioners submitted findings of fact and conclusions of law drawn entirely from the affidavits they had submitted; the trial court signed the document despite respondents' objections. (R.88, 122). The basis for the defense objections included not only the lack of opportunity to conduct discovery regarding the facts, including complex scientific "facts" regarding hydrogeology as stated by environmental lawyer/hydrogeologist Charles (Buck) Sweeney (one of the principals of Edgerton Sand & Gravel), but also the trial court's refusal to recognize disputed questions of fact related to Mr. Sweeney's deposition testimony and its divergence with his averments.

Although the trial court never expressly ruled on respondents' motion for a continuance, it appears that its haste to decide the motion was based on petitioners' assertions that a WDNR deadline (as referred to on page 6 of the petition) was looming.

In its haste to enter judgment for petitioners, the trial court went so far as to enter a judgment requiring Aetna to defend and indemnify the City of Edgerton even though Aetna never insured the City. (R.96). This error was corrected by the Court of Appeals of Wisconsin (Pet. App. 152).

Respondent Aetna lays out this procedural history as a background for understanding its contentions regarding the unreliability of the underlying facts as set forth by petitioners.

It should be noted that petitioner Edgerton Sand & Gravel, in a motion not joined by the City of Edgerton, has moved the court for vacation of its judgment on the grounds that the author of the majority opinion, Justice Janine Geske, must be disqualified on the grounds that she has a significant interest in the outcome of the suit. The motion is not technically timely filed pursuant to Rule 809.64, Wis. Stats. Aetna has challenged its timeliness. The Wisconsin Judicial Commission has concluded, in a separate investigation relating to this accusation, that it is meritless. Justice Geske has made this finding a part of the court record. In very similar circumstances, the Wisconsin Supreme Court has not only denied such a motion, but has done so sharply rebuking the moving party. *See State v. American T.V. & Appliance*, 151 Wis. 2d 175, 443 N.W. 2d 662 (1989). It appears likely that this motion will be denied in the near future.

iii) Factual Background.

Petitioners represent that the Edgerton Sand & Gravel Landfill was used for waste disposal for local residents, municipalities and industries, and that the wastes disposed of included ashes, garbage and rubbish. (Pet. 4). However, the landfill was licensed only for municipal waste, not industrial or hazardous waste. (R.5 at 44).

Petitioners also assert that the alleged contamination by volatile organic compounds (VOCs) found in groundwater at or near the site was caused by a slow and continuous migration of VOCs into the water supply. (Pet. 4-5). Buck Sweeney, whose affidavit provides the factual source of this contention, conceded in his deposition that he had also previously represented that the source of the contamination was a sudden rupture of the natural clay pan underlying the landfill site. (R.51 at Ex. 51). Mr. Sweeney's change of theory regarding how the contamination occurred coincided with the Wisconsin appellate courts' change

in interpretation of the pollution exclusion in general liability policies in *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W. 2d 570 (1990).

The remainder of petitioners' facts discuss the process by which the Wisconsin Department of Natural Resources and the United States Environmental Protection Agency sought to ensure voluntary clean-up of the landfill site. (Pet. 5-7). The petitioners' recitation of the facts exaggerates the tone of the EPA and WDNR correspondence and fails to point out that the "deadlines" imposed by the agencies were, in fact, not enforced. Thus, these recitations were disputed at the lower court levels. It should be pointed out, also, that petitioners' inclusion of these "facts" was directed at a different issue than that presented here — the issue of whether a "suit" had been instituted. Thus, given their limited relevance to this petition, respondent Aetna simply points out that these "facts," too, are disputed.

Petitioners do accurately quote the policy language at the heart of this petition. (Pet. 7).

SUMMARY OF ARGUMENT

This petition does not merit this Court's exercise of certiorari. First, no real issue of federal substantive law exists. Instead, the Wisconsin Supreme Court merely decided an issue of state law, the meaning of the term "damages" as used in an insurance policy. Because this question is one of state law, no true conflict between the circuits and state courts of last resort exists; instead, each is applying the insurance law of the particular state. Nor is there any reason to pre-empt state law here. For all these reasons, this Court should deny this petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

THE WISCONSIN SUPREME COURT'S DECISION INVOLVES PRIMARILY A QUESTION OF STATE LAW AND DOES NOT MERIT THIS COURT'S REVIEW.

Supreme Court Rule 10.1 sets forth the character of reasons that are considered appropriate for the Supreme Court's discretionary review. This petition meets none of those criteria.

A review of the Wisconsin Supreme court's decision in this case reveals that the two issues that court considered involved only questions of insurance policy coverage, questions decided by reference to long-standing Wisconsin law regarding insurance policy construction. A necessary part of that review involved determining whether the monies sought, response costs payable pursuant to the Wisconsin equivalent of CERCLA, were payable "as damages" as that term is used in Wisconsin insurance policies. To answer that question, the Wisconsin Supreme Court did examine the statutes and federal regulations creating and controlling CERCLA. However, petitioners' characterization of the decision as one determining an important substantive point of federal law is, like their characterization of the WDNR and EPA letters, nothing more than hyperbole.

This Court has long stressed that its role is not to review matters of state law. *See, e.g., Huddleston v. Dwyer*, 322 U.S.232, 237 (1944). Consistent with such statements, this court has denied certiorari in insurance coverage disputes governed by state law. *See, e.g., Eli Lilly v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1060 (1987); *Eagle Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co.*

of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-eight Insulations*, 633 F.2d 1212 (6th Cir. 1980); *cert denied*, 454 U.S. 1109 (1981). In fact, this Court has denied certiorari in at least five cases presenting the same question presented here, the meaning of the phrase "as damages" pursuant to the law of the state governing construction of that policy. *See Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940 (D.C. Cir. 1991), *cert denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Corp.*, __U.S.__, 112 S. Ct. 1777 (1992); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2nd Cir. 1991), *cert denied sub nom., Universal Underwriters Ins. Co. v. Gerrish Corp.*, __U.S.__, 112 S. Ct. 2939 (1992); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2nd Cir. 1989), *rehearing denied*, 894 F.2d 498, *cert denied*, 496 U.S. 906 (1990); *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert denied sub nom., Missouri v. Continental Ins. Cos.*, 488 U.S. 821 (1988); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

Presentation of this same issue now does not suddenly warrant review. Not only does the issue remain one of state law, in itself a reason for this Court to deny review, the issue as framed by petitioners is not squarely raised on these facts. Thus, even if the Court were interested in addressing the issue framed by petitioners, this case does not present it with an appropriate factual context for such a discussion.

Petitioners cite to *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) and *Key Tronic Corp. v. United States*, __U.S.__, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994), as cases with which the Wisconsin Supreme Court's decision conflicts. However, the *Union Gas* and *Key Tronic* cases presented far different issues and fact situations than in this case. In *Key Tronic*, this Court

and fact situations than in this case. In *Key Tronic*, this Court considered what monies were recoverable pursuant to CERCLA rules for liability in a contribution action; specifically, the issue was whether certain attorneys' fees were recoverable. This Court focused on 42 U.S.C. § 9607, which sets forth the scope of the liabilities CERCLA imposes on private parties. In *Union Gas*, the issue before this Court was whether it was constitutional for private parties to sue a state in a CERCLA contribution action, an issue involving the interplay of the Commerce Clause and the Eleventh Amendment.

In both *Key Tronic* and *Union Gas*, this Court considered directly the United States Code provisions comprising CERCLA in a CERCLA contribution action, once examining the provisions of the legislation and the other time examining not only its scope but its constitutionality. Here, the issue is not a question directly regarding the scope of CERCLA, but instead, the issue is what relief a party liable under CERCLA may be able to obtain from its insurer via the contract between them. Neither *Key Tronic* nor *Union Gas* is even on point; more importantly, there is no conflict between their holdings and that of the Wisconsin Supreme Court, which did not consider, even remotely, the same issues. As Justice Holmes observed in *Town v. Eisner*, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary in color and content according to the circumstances and the time in which it is used." The context of this case is different than that in *Key Tronic* and *Union Gas*, and thus, there is no conflict.

Nor does the Wisconsin Supreme Court's decision conflict with the language or intent of CERCLA itself, as petitioners argue. First, CERCLA's express language defines certain monies payable as response "costs" both in enforcement actions and private party actions, 42 U.S.C. § 9607(a)(4)(A), while defining other monies payable as natural resource "damages," 42 U.S.C.

the plain language of the statute when determining whether the monies sought were payable pursuant to the terms of the parties' insurance contracts.

Second, the Wisconsin Supreme Court's decision is fully in accord with CERCLA's intent. Petitioners argue that CERCLA expressly contemplated that insurance coverage could be purchased to assist PRP's in paying for clean-up costs. (Petition at 15, *citing* 42 U.S.C. § 9607(e)(1)). While CERCLA did contemplate that such coverage could exist, it did not go so far, as petitioners assert, as to obliterate the terms of already existing contracts. Coverage was not mandated, it was allowed where purchased. It was not purchased by these petitioners. Thus, a finding that the policy the petitioners purchased did not have such coverage does not thwart CERCLA in any way.

Petitioners exaggerate the existence of a federal question just as they exaggerate the meaning of plain cases and statutes. There is nothing here that merits review by this Court.

II.

THERE IS NO CONFLICT IN THE CIRCUITS AND STATE COURTS REGARDING THIS ISSUE.

In *Erie Ry. Co. v. Tompkins,* 304 U.S. 64 (1938), this Court required federal courts sitting in diversity cases to apply state substantive law whenever it is controlling. The *Erie* doctrine recognizes the rights of the states to make their own laws except where pre-empted by federal law. The fact that other state courts construing insurance contracts under their own state law rules of contract construction, and other federal courts construing state law under the *Erie* doctrine, have reached different conclusions does not present a "conflict" within the traditional meaning of this Court's exercise of certiorari jurisdiction. There is no

"conflict" among the circuits and state courts of last resort of the type this Court should undertake to resolve. In fact, pursuant to the *Erie* doctrine, this is the very type of conflict which is contemplated in a federal system such as ours.

Nonetheless, petitioners seek to have this Court resolve that "conflict" on the grounds that, if state courts do not uniformly find insurance coverage for pollution clean-ups, CERCLA will be thwarted. However, as noted above, petitioners can point to no provision of CERCLA authorizing such a sweeping change in the rights of parties to private contracts. Not only has such an approach been rejected by federal courts, this Court has denied certiorari in such cases. *See, e.g., American Policyholder Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 682 (1994). Certiorari should likewise be rejected here as CERCLA itself expressly rejects such a uniform approach. *See*, 42 U.S.C. § 9672(a), stating: "Nothing in this subchapter shall be construed to affect . . . the law governing the interpretation of insurance contracts of any state."

The result petitioners desire is expressly contrary to the very law they claim they seek to enforce. Under the circumstances, review by this Court is simply not merited.

CONCLUSION

Petitioners present this Court with no real issues to address. This case does not squarely present the factual basis for the issue they assert, nor does it squarely present the legal issue. In fact, the true issue in this case is one of state law contract interpretation, an issue which does not merit this Court's attention. For all of these reasons, respondent Aetna Casualty and Surety Company respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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No. 94-1256

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In The

Supreme Court of the United States

October Term, 1994

CITY OF EDGERTON, AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY & SURETY COMPANY,

Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL CASUALTY COMPANY OF WISCONSIN

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court correctly determined, following Wisconsin principles of insurance contract interpretation, that the term "damages," as used in the insurance context, does not include response costs under CERCLA or equivalent Wisconsin state statutes?

STATEMENT PURSUANT TO RULE 29.1

Respondent General Casualty Company of Wisconsin is a corporation organized under the laws of the State of Wisconsin and is owned by Winterthur U.S. Holdings. Winterthur U.S. Holdings is a Delaware Corporation wholly owned by Winterthur Swiss Insurance Company, a Swiss Company.

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No. 94-1256

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CITY OF EDGERTON, AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

v.

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WISCONSIN INSURANCE SECURITY FUND,

Defendant,

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HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL CASUALTY COMPANY OF WISCONSIN

Respondent General Casualty Company of Wisconsin (General Casualty) respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the Supreme Court of the State of Wisconsin.

STATEMENT OF THE CASE

This case involves an issue concerning insurance coverage for environmental response costs.[1] It requires the interpretation of insurance contracts issued by General Casualty to Edgerton Sand & Gravel, Inc. (ES&G) and the City of Edgerton (the City) under Wisconsin law.[2]

The insuring agreement contained in the General Casualty policies provides:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages* because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an

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1. Pursuant to Supreme Court Rule 15.1, General Casualty objects to the Petitioners' statement of the case to the extent the Petitioners rely upon disputed facts or facts not in the record. However, because the issue in this case involves an issue of insurance contract interpretation, the underlying facts contained in the Petitioners' statement of the case are not relevant.

2. Respondent Aetna Casualty & Surety Company also issued policies of insurance to ES&G.

> occurrence, and the company shall have the right and duty to defend *any suit against the insured seeking damages. . . .*

(Pet. App. 119) (emphasis added).

On December 29, 1990, ES&G and the City commenced a state court action in Rock County Circuit Court seeking a declaration that the comprehensive general liability (CGL) policies issued by General Casualty provided coverage for response costs associated with the Edgerton Landfill. The parties sought the state court's interpretation of a variety of policy provisions including the provision requiring that there be a "suit against the insured seeking damages."

Although it was undisputed that a lawsuit seeking damages had not been commenced against ES&G or the City, ES&G and the City claimed that letters they received from the government were the "functional equivalent" of a lawsuit and that response costs were "damages" within the meaning of the insurance policy. General Casualty maintained that, under Wisconsin law, a "suit" requires a court proceeding and response costs are equitable in nature and therefore not legal damages.

Relying on Wisconsin law, the Wisconsin Supreme Court determined that the term "suit" as used in insurance policies, was unambiguous. Quoting a case decided earlier in the term, the court stated:

> [I]n *State v. P.G. Miron Const. Co., Inc.*, 181 Wis. 2d 1045, 512 N.W. 2d 499 (1994), . . . we defined "suit" as
>
> > "any proceeding by one person or persons against another or others in a

> court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or equity."

(Pet. App. 125) (emphasis in the original). Thus, following Wisconsin law, the Wisconsin Supreme Court determined that the term "suit" requires an actual court proceeding and letters from a governmental agency did not constitute a "suit."

Next, the court turned to the issue of "damages." Again, relying on Wisconsin precedent, the court determined that the term "damages," as used in insurance policies, is well-defined in Wisconsin. *Quoting Shorewood School District v. Wausau Insurance Companies*, 170 Wis. 2d 347, 368, 488 N.W. 2d 88, 89 (1992), the court stated that, in Wisconsin, the term " ' '[d]amages' as used in . . . insurance policies unambiguously means legal damages.' " (Pet. App. 136). Since response costs under CERCLA and equivalent Wisconsin state statutes[3] are equitable in nature, they do not constitute "damages." Consequently, no suit had been commenced against ES&G and the City seeking damages and the court determined General Casualty was entitled to summary judgment.

ES&G and the City filed a motion requesting the Wisconsin Supreme Court reconsider its decision concerning both the "suit" and "damages" issues. The motion was denied on October 25, 1994. ES&G and the City now petition for writ of certiorari seeking only a review of the "damages" issue.

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3. It is important to note that although the Wisconsin Supreme Court used the CERCLA statutory scheme as a guide, the cleanup in the underlying matter was performed pursuant to Wisconsin state statutes and not CERCLA. (Pet. App. 108-111).

SUMMARY OF THE ARGUMENT

No reason exists for the grant of certiorari. This case involves a state law question of insurance contract interpretation. This Court has rejected virtually identical petitions raising the same arguments on five prior occasions.[4] ES&G and the City have failed to provide any reason to treat this petition differently.

This case involves a state law issue since it concerns a question of insurance contract interpretation. The interpretation of Wisconsin insurance law is far removed from the role of this Court. In an attempt to create a federal issue, ES&G and the City claim review is necessary under Supreme Court Rule 10.1(b) because there is a conflict among the United States courts of appeal and state courts of last resort. However, this conflict is "merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 206 (1938). This is not a sufficient reason to grant certiorari. *Id.*

ES&G and the City also claim review is necessary under Supreme Court Rule 10.1(c) because the Wisconsin Supreme Court decision purportedly conflicts with decisions of this Court and a federal statute. As noted above, this is a state issue

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4. *See Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2939 (1992); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Company*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Corp.*, 112 S. Ct. 1777 (1992); *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *rehearing denied*, 894 F.2d 498 (1990), *cert. denied*, 496 U.S. 906 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied sub nom., Missouri v. Continental Ins. Companies*, 488 U.S. 821 (1988); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

involving Wisconsin insurance contract interpretation. However, even if this issue could somehow be transformed into a federal issue, the Wisconsin Supreme Court decision is entirely consistent with federal law.

Finally, ES&G and the City call for a national uniform rule obliterating insurance contract terms and superseding state law principles of insurance contract interpretation. Such a radical measure would be directly contrary to federal decisions and CERCLA itself.

REASONS FOR DENYING THE WRIT

I.

THE INTERPRETATION OF A COMPREHENSIVE GENERAL LIABILITY POLICY BY A STATE'S HIGHEST COURT IS NOT AN ISSUE WARRANTING CERTIORARI.

ES&G and the City claim review is necessary under Supreme Court Rule 10.1(b) because there is a split among United States courts of appeal and state courts of last resort concerning whether response costs constitute "damages." Review under Supreme Court Rule 10.1(b) is only appropriate or necessary when the conflict involves a federal question. This case presents a state law question of insurance contract interpretation. It involves issues of state law, not federal law, and does not warrant certiorari.

The issue is not (as ES&G and the City now contend) whether monies paid pursuant to CERCLA constitute damages as defined by this and other federal courts. Rather, the issue is whether, under Wisconsin law, response costs constitute "damages" as that term is used in CGL policies.

It is well established that interpretation of an insurance policy is governed by state law.[5] ES&G and the City both concede this. (Pet. at 16). However, they attempt to create a federal law issue by claiming that this matter is controlled by CERCLA. (Pet. at 16). Courts have uniformly rejected this argument holding that state law applies in insurance coverage cases involving CERCLA.[6] Because the interpretation of insurance policies is a matter of state law, this Court has consistently denied review of insurance coverage disputes including those involving CERCLA.[7] In fact, this Court has denied certiorari in at least five

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5. *See, e.g., Interco Inc. v. National Sur. Corp.*, 900 F.2d 1264, 1266 (8th Cir. 1990); *Provau v. State Farm Mut. Auto Ins. Co.*, 772 F.2d 817, 819 (11th Cir. 1985); *Nationwide Mut. Fire Ins. Co. v. Fleming*, 750 F. Supp. 996, 999 (E.D. Mo. 1990); *Alfin, Inc. v. Pacific Ins. Co.*, 735 F. Supp. 115, 118 (S.D.N.Y. 1990).

6. *See American Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1263 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994)("[t]he massed authority for treating insurance coverage questions in CERCLA cases as peculiarly matters of state law pervades the court of appeals"); *see also Aetna Cas. & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 712-13 (8th Cir. 1992); *Northern Ins. Co. of New York v. Aardvark Assoc., Inc.*, 942 F.2d 189, 192 (3d Cir. 1991); *Industrial Indem. Ins. Co. v. Crown Auto Dealership, Inc.*, 935 F.2d 240, 241 (11th Cir. 1991); *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214, 217 (6th Cir. 1990), *cert. denied*, 498 U.S. 911 (1990); *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 741 F. Supp. 298, 300 (D. Mass. 1990), *aff'd*, 933 F.2d 66 (1st Cir. 1991); *Hazen Paper Co. v. U.S.F.& G.*, 407 Mass. 689, 555 N.E. 2d 576, 583 (1990).

7. *See, e.g., Broderick Ins. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992); *Lumbermens Mut. Cas. Co. v. Belleville Industries, Inc.*, 938 F.2d 1423 (1991), *cert. denied*, 502 U.S. 1073 (1992); FL *Aerospace*, 897 F.2d 214; *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

cases involving the identical insurance coverage issue presented here.[8]

Moreover, this "split" has not developed because courts interpret CERCLA differently. It is because individual states have defined the term "damages," for insurance purposes, differently. In the cases addressing the "damages" issue, courts (both state and federal) define the term "damages" under the applicable state's rules of insurance contract interpretation. In states where the controlling state law defines the term "damages" as "legal damages," courts have held response costs are not covered by CGL policies.[9] In states where the controlling state law contrues the term "damages" broadly or finds it ambiguous,

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8. *See Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2939 (1992); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Company*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Corp.*, 112 S. Ct. 1777 (1992); *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *rehearing denied*, 894 F.2d 498 (1990), *cert. denied*, 496 U.S. 906 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied sub nom., Missouri v. Continental Ins. Companies*, 488 U.S. 821 (1988); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

9. *See, e.g., Grisham v. Commercial Union Ins. Co.*, 951 F.2d 872, 875 (8th Cir. 1991) (Arkansas defines "damages," as used in the insurance policy, as legal damages); *Parker Solvents Co. v. Royal Ins. Companies of America*, 950 F.2d 571, 572 (8th Cir. 1991) (same); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (applying South Carolina law, "damages" means legal damages); *Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d at 985 (following Missouri law, "damages" refers to legal damages); *Armco, Inc.*, 822 F.2d at 1351 (Maryland has adopted a narrow, technical definition of "damages" requiring legal damages).

the courts hold that the term "damages" includes equitable relief such as response costs.[10]

Even ES&G and the City's own authority explains that the difference between the holdings is a result of varying state law rather than a conflict with federal law. In *Independent Petrochemical Corporation*, the United States Court of Appeals for the District of Columbia stated:

> Our research reveals that, with the exception of NEPACCO, in every case in which the operative state's rules of insurance contract interpretation required — as Missouri's does — resort to the common and ordinary understanding of language, the word "damages" has been construed to cover reimbursement for environmental response costs incurred by a government. . . . Decisions construing the term differently were apparently governed by state rules of interpretation under which the technical or legal meanings of language controlled.

944 F.2d at 946. This Court denied certiorari of *Independent Petrochemical Corporation*. *See* 112 S. Ct. 1777.

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10. *See, e.g., Gerrish Corp.*, 947 F.2d at 1029-31 (under Vermont law, "damages" has a broad meaning); *Independent Petrochemical Corp.*, 944 F.2d at 946 (disagreeing with NEPACCO and determining application of Missouri law requires a broad interpretation of the term "damages"); *Avondale Indus., Inc.*, 887 F.2d at 1207 (Louisiana defines damages broadly); *Hazen Paper Co.*, 407 Mass. at 699, 555 N.E. 2d at 583 ("damages" is ambiguous under Massachusetts law); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W. 2d 175, 179 (Minn. 1990) (under Minnesota law, the term "damages" is ambiguous).

This Court has long held that a conflict among courts on issues involving state law is not sufficient reason for granting certiorari. *Ruhlin*, 304 U.S. at 206 (certiorari should be denied when the conflict was "merely corollary to a permissible difference of opinion in the state courts"). Because the split of authority is not based on federal law but arises solely as a result of individual states applying their own principles of insurance contract interpretation, review is not warranted.

II.

THE WISCONSIN SUPREME COURT DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE STATUTORY SCHEME OF CERCLA.

In an attempt to circumvent the Court's traditional refusal to review state law issues, ES&G and the City claim the Wisconsin Supreme Court's characterization of response costs as equitable relief conflicts with decisions of this Court. (Pet. at 17). ES&G and the City are wrong. A review of the applicable cases demonstrates the Wisconsin Supreme Court's decision is entirely consistent with federal court decisions and CERCLA itself.

Following Wisconsin precedent, the Wisconsin Supreme Court determined the term "damages," as used in CGL policies, unambiguously means legal damages. Legal damages "compensate for wrongs or injuries that [are] generally pecuniary in nature." (Pet. App. 136). Damages, under Wisconsin insurance law, are a form of substitutionary relief; that is, they give the injured party money to make up for the claimed loss. *Shorewood*, 170 Wis. 2d at 369, 488 N.W. 2d at 89. They do not encompass restitutionary or injunctive relief which is designed to "give the plaintiff the very thing to which he was entitled." *Shorewood*, 170 Wis. 2d at 369, 488 N.W. 2d at 89. Thus, in Wisconsin, the term "damages," as used in insurance policies, includes only legal

damages and does not include equitable monetary relief. (Pet. App. 136).

Following these Wisconsin principles, the Wisconsin Supreme Court determined response costs under 42 U.S.C. § 9607(a)(4)(A), 42 U.S.C. § 9607(a)(4)(B) and equivalent Wisconsin state statutes are equitable in nature, unlike damages for the injury, destruction or loss of natural resources under 42 U.S.C. § 9607(a)(4)(C). A review of the statutory scheme itself demonstrates response costs actions under CERCLA or equivalent Wisconsin state statutes are, by definition, equitable actions invoking injunctive and restitutionary relief. Under CERCLA, costs may be imposed upon responsible parties under § 9606 or § 9607. Section 9606 creates a cause of action for *injunctive relief* for abatement. Under this section, the government may force a responsible party to perform a cleanup under the mandate of a federal injunction. Section 9607(a) creates causes of action which:

1. Allow the government to sue for reimbursement of response costs (§ 9607(a)(4)(A));

2. Allow private parties to sue for response costs (§ 9607(a)(4)(B));

3. Allow the government to sue for *damages* for injury, destruction or loss of natural resources. § 9607(a)(4)(C).

Thus, §§ 9607(a)(4)(A) and 9607(a)(4)(B) create a cause of action for response costs. Only § 9607(a)(4)(C) creates a cause of action for damages.

Not only does CERCLA expressly distinguish between

response costs and damages for harm to natural resources, the distinction between the two forms of relief has been well defined by federal courts interpreting CERCLA. Federal courts have consistently held response costs actions under CERCLA are equitable actions invoking injunctive and restitutionary relief and do not constitute actions for legal damages.[11] However, federal courts interpreting claims for natural resource damages have determined those claims are compensatory in nature and are distinct from response costs. *See In re Acushnet River & New Bedford Harbor Proceedings*, 712 F. Supp. 994 (D. Mass. 1989).

A review of the Final Rule demonstrates that the government recognizes claims for natural resource damages are compensatory in nature and are distinct from response costs which are considered equitable. According to the Final Rule promulgated by the Department of Interior:

> *CERCLA authorize[s] natural resource trustees to recover compensatory damages* for injury to, destruction of, or losses of natural resources resulting from . . . a release of a hazardous substance.
>
> * * *
>
> *Damages may be recovered for those natural*

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11. *See, e.g., American Cyanamid Co. v. King Industries, Inc.*, 814 F. Supp. 209, 213-14 (D.R.I. 1993) (courts have uniformly held there is no right to a jury trial in a CERCLA action because a "CERCLA action to recover response costs is equitable in nature" and is not an action for "legal damages"); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Mexico Feed & Seed Co.*, 729 F. Supp. 1250, 1254 (E.D. Mo. 1990); *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410, 1413 (W.D. Mich. 1988), *affirmed sub nom., United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

> *resource injuries and losses that are not fully remedied by response actions. All sums recovered in compensation for natural resource injuries must be used to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources.*

Final Rule 59 Fed. Reg. 14262, 14262 (Mar. 25, 1994) (emphasis added).

The portion of the administrative regulation cited by ES&G and the City belies their point. (*See* Pet. at 14). They claim that because the measure of damages for natural resource damage claims includes the cost of restoring, rehabilitating, replacing and/or acquisition of the equivalent of the injured natural resources, natural resource damages and response costs are the same. Their argument ignores the fact that damages may only be recovered for those natural resource injuries and losses not fully remediated by response actions. Final Rule, 59 Fed. Reg. at 14262; *see also,* 42 U.S.C. § 9607(f)(1) (forbidding double recovery for response costs and natural resource damages). In other words, the government, in natural resource damage actions, is awarded damages to compensate for the injuries to the natural resources which cannot be restored or remediated. Thus, consistent with the Wisconsin Supreme Court decision, the administrative regulations also recognize the compensatory nature of natural resource damage claims in contrast to the equitable nature of response costs.

ES&G and the City's argument that the Wisconsin Supreme Court's decision is in conflict with decisions of this Court also fails. This Court has never held that response costs constitute legal damages. ES&G and the City's reliance upon *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) is misplaced.

In *Key Tronic Corp.*, a case involving a contribution claim under 42 U.S.C. § 9613(f), this Court narrowly defined the issue as "whether attorney's fees are 'necessary costs of response' within the meaning of § 107(a)(4)(B)." *Key Tronic*, 114 S. Ct. at 1962. In limiting itself to this issue, the Court determined that attorney fees incurred in pursuing litigation were not recoverable under the American Rule. *Key Tronic*, 114 S. Ct. at 1967. Nowhere in *Key Tronic* does this Court hold response costs constitute "legal damages." That simply was not an issue in the case. In fact, the word "damages" does not even appear in the decision.

ES&G and the City claim that the *Key Tronic* decision "treats" response costs as damages by recognizing an implied right of contribution which Congress made explicit by amendment in 1986. (Pet. at 12). However, mere authorization by Congress of a cost recovery or contribution claim for response costs does not, *ipso facto*, turn response costs into legal damages.

Prior to 1986, the right to contribution under CERCLA was implied under 42 U.S.C. § 9607. In 1986, Congress passed 42 U.S.C. § 9613(f) which provides an express right to contribution. The Congressional intent of allowing the enactment of § 9613(f) emphasizes the equitable nature of contribution and the policy reasons surrounding its enactment. According to the House Report:

> This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup costs that may be greater then its equitable share under the circumstances. . . .

H.R. Rep. No. 253 (I), 99th Cong., 1st sess. 1, 80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861-62. Nowhere in the statute's legislative history reports did Congress reveal an intent to treat response costs as legal damages. Rather, the intent was simply to incorporate fairness into the statutory scheme. This was confirmed in *Transtech Industries, Inc. v. A&Z Septic Clean*, 798 F. Supp. 1079, 1086 (D.N.J. 1992), *cert. denied sub nom., Mayco Oil & Chemical Co. v. Transtech Industries, Inc.*, 114 S. Ct. 2692 (1994) (purpose for enactment is to allow PRPs to "gain reimbursement for their cleanup expenditures from other PRPs").

Contribution under CERCLA is simply a statutory mechanism created by Congress allowing a party that has paid more than its fair share to be reimbursed. Thus, recognition of an implied right of contribution for response costs which Congress made explicit by amendment in 1986 does not transform response costs into legal damages and *Key Tronic* is inapplicable.

ES&G and the City's reliance on *Pennsylvania v. Union Gas Company* is equally misplaced. The issue addressed in *Union Gas* was whether states are immune under the Eleventh Amendment from contribution actions under CERCLA. Nowhere in *Union Gas* did this Court analyze the nature of response costs or the issue concerning whether response costs constitute equitable monetary relief or legal damages.

ES&G and the City apparently believe that because this Court used the term damages in *Union Gas*, response costs necessarily constitute legal damages. ES&G and the City do not distinguish between the term "damages" when used generically and the term "damages" when used in the insurance context (which Wisconsin has defined as legal damages). As the court in *Continental Insurance v. Northeastern Pharmaceutical* stated:

> Viewed outside the insurance context, the

> term "damages" is ambiguous: it is reasonably open to different constructions. Webster's New International Dictionary 571 (1971) defines "damages" as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for wrong or injury caused by a violation of a legal right." The dictionary definition does not distinguish between legal damages and equitable monetary relief. . . .
>
> In the insurance context, however, the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief.

Northeastern Pharmaceutical, 842 F.2d at 985.

Because *Union Gas* only involved the issue of immunity, there was no reason for the Court to determine whether response costs constituted legal damages or equitable monetary relief. Thus, *Union Gas* is not on point.

ES&G and the City fail to cite the only Supreme Court case on point, *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). This Court specifically stated in *Exxon Corp.* that response costs are designed to facilitate cleanup and prevent future releases, and are not designed to "compensate private parties for economic harms that result from discharges of hazardous substances." 475 U.S. at 359-60. This is precisely how the Wisconsin Supreme Court viewed response costs. (Pet. App. 137-38).

The Wisconsin Supreme Court decision is entirely consistent with decisions of this Court, CERCLA's statutory

scheme and administrative rules. There is no reason for the grant of certiorari.

III.

IMPOSING A NATIONAL UNIFORM RULE OBLITERATING INSURANCE CONTRACT TERMS AND SUPERSEDING STATE LAW PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION IS DIRECTLY CONTRARY TO CERCLA AND FEDERAL COURT DECISIONS.

Finally, in an attempt to create a federal issue worthy of certiorari, ES&G and the City broadly assert, without authority, that this Court should impose a national uniform rule superseding state law principles governing insurance contract interpretation. (Pet. at 18). Under their approach, courts would be required to disregard all contract provisions and well-established state insurance law principles when the underlying claims involve CERCLA. Calls for such extreme measures have been squarely rejected by federal courts and CERCLA itself.

In *American Policyholder Insurance Company v. Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994), the court rejected the application of a uniform federal rule stating, "[w]e decline to heed that call in the face of solid precedent pointing in the opposite direction." 989 F.2d at 1263 (see also cases cited therein). In reaching its determination, the court further stated:

> Case law aside, we doubt that Congress intended CERCLA to be the springboard for catapulting federal courts into what has historically been a state-law preserve. Congress has made it plain that federal

> legislation should rarely be interpreted to encroach on a state's regulation of insurance. See, e.g., McCarran-Ferguson Act, 15 U.S.C. § 1010(b)(1988).

989 F.2d at 1263; *see also Hudson Ins. Co. v. Double D Management Co.*, 768 F. Supp. 1538, 1541-42 (M.D. Fl. 1991). This Court denied certiorari in *Nyacol Products* last year.

CERCLA itself recognizes the application of state law to resolve insurance issues. 42 U.S.C. § 9672(a) expressly states in pertinent part:

> Nothing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State.

See also Nyacol Products, 989 F.2d at 1263. ("CERCLA's text not only envisions the bringing of suits under state law but specifically mandates their resolution in accordance with that law"); *Hudson Insurance Co.*, 768 F. Supp. 1538. (CERCLA specifically prohibits preemption of state insurance law).

Finally, the imposition of such a drastic measure would conflict with fundamental principles established by this Court in *Erie Railroad Co. v. Tompkins*. 304 U.S. 64, 74 (1938). In *Erie* this Court rejected the notion of a uniform rule of law in matters reserved to the states. *See also Ruhlin*, 304 U.S. 202; cases cited *supra* notes 5 and 6.

Because ES&G and the City's call for a national rule is prohibited by CERCLA and fundamental principles articulated by this Court, there is no reason to grant certiorari.

CONCLUSION

Based upon the foregoing, ES&G and the City's petition for a writ of certiorari should be denied.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

CITY OF EDGERTON,
AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

[Caption Continued]

Joint Petition on Behalf of City of Edgerton and Edgerton Sand & Gravel, Inc. For Writ of Certiorari to the Supreme Court of the State of Wisconsin

JOINT REPLY BRIEF OF CITY OF EDGERTON AND EDGERTON SAND & GRAVEL, INC.

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BEST AVAILABLE COPY

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES,
WAUSAU INSURANCE COMPANIES,
AND LOCAL GOVERNMENT PROPERTY
INSURANCE FUND,

Defendants.

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REPLY BRIEF

I. THIS COURT SHOULD GRANT THE PETITION TO CORRECT THE WISCONSIN SUPREME COURT'S MISCONSTRUCTION OF FEDERAL LAW IN HOLDING THAT CERCLA RESPONSE COSTS WERE SOLELY EQUITABLE RELIEF WHICH DO NOT CONSTITUTE DAMAGES.

A federal question meriting review by this Court is presented when the highest court of a state undertakes to construe federal statutes according to its determination of what Congress intended, and misconstrues the federal statutes contrary to prior decisions of this Court and the circuit courts of appeals. Supreme Court Rule 10.1(c).

The issue before this Court is the Wisconsin Supreme Court's construction of 42 U.S.C. § 9607(a)(4)(A) to constitute solely equitable relief which does not include damages. The insurers incorrectly assert that the Wisconsin Supreme Court's decision was merely an interpretation of state insurance law. The decision itself, the reasoning underlying the decision and the insurers' own arguments in response to the petition, all establish that this case revolves upon a critical question of federal law which desperately requires a national, uniform construction by this Court.

To reach its decision, the Wisconsin Supreme Court distinguished between the relief available under two subsections of § 9607. The court contrasted between relief for response costs pursuant to § 9607(a)(4)(A), which it construed to be equitable, with relief for natural resources pursuant to § 9607(a)(4)(C), which it construed to be damages. This is the construction of a federal statute and involves an important question of federal law which warrants review by this Court.

Despite the insurers' repeated attempts to characterize the question before this Court as merely a matter of state insurance law, the Wisconsin Supreme Court clearly perceived this as a matter of federal law. The Wisconsin Supreme Court recognized as much when it declared:

> Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C). See Insurance Coverage for CERCLA Claims, 68 Notre Dame L. Rev. at 561.

(A.Ap. at 137; emphasis added.) There can be no question that in determining congressional intent, the Wisconsin Supreme Court realized it was construing a federal statute. The unequivocal language of the decision establishes the lack of merit to the insurers' contention that this merely involves a matter of state insurance law.

The Wisconsin Supreme Court's reliance upon federal law as a basis for its decision is underscored by its reliance upon a student note, Kristin A. Kolesar, Note, Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste In the Legal Environment, 68 Notre Dame L. Rev. 549 (1993) (hereinafter Kolesar). The Court cited this article several times throughout its opinion, extensively relying upon its analysis. (A.Ap. at 135-37.) Interestingly, the insurers do not cite this article upon which the Wisconsin Supreme Court so heavily relied. The reason is that an examination of the article reveals that it, like the Wisconsin Supreme Court, relied upon congressional intent and a construction of

CERCLA to conclude response costs are not damages. Kolesar, 68 Notre Dame L. Rev. at 561-64 (citing and referring repeatedly to CERCLA's statutory language and congressional intent).

More importantly, the Kolesar note recognizes that this Court's decision in Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 1 (1989) is contrary to the author's interpretation of CERCLA and attempts to distinguish that decision. The note rationalizes the decision as follows:

> In Independent Petrochemical Corp. v. Aetna Casualty & Surety Co. [944 F.2d 940 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1777 (1992)], the District of Columbia Circuit attempted to discredit the notion that the separation of the provision into damages and equitable relief evinces congressional intent. The court rejected the insurer's argument that the language of CERCLA necessarily corresponds with a construction of "damages" that does not include liability for the government's cleanup costs. The court cited for support the case of Pennsylvania v. Union Gas Co., in which the Supreme Court characterized section 9607 as providing "liability in damages" and concluded that CERCLA "'hold[s] States liable in damages in federal court.'" However, the Supreme Court never stated, either explicitly or implicitly, that damages are the exclusive remedy available under section 9607. Therefore, the Supreme Court's interpretation does not contradict the notion that congressional intent to distinguish between equitable relief and legal damages is manifested by section (4)(A) and section (4)(C), respectively.

Kolesar, 68 Notre Dame L. Rev. at 463-64 (emphasis added).

This Court's decision in Union Gas Co. is applicable to the present case. The only relief sought by the respondent in Union Gas Co., as established by the Joint Petition at 11-12 and not contested by the insurers, was response costs pursuant to § 9607(a)(4)(A). This Court repeatedly declared this relief was damages. Union Gas Co., 491 U.S. at 7, 12-13. Kolesar's argument to the contrary and the Wisconsin Supreme Court's reliance on the note are simply wrong. The District of Columbia Circuit recognized the applicability of Union Gas Co. to the precise issues decided by the lower court in this case:

> Moreover, courts that have interpreted CERCLA do not seem to distinguish governmental cleanup costs from "damages." The Supreme Court characterized section 107 as providing "liability in damages," and concluded that CERCLA "hold[s] States liable in damages in federal court." Pennsylvania v. Union Gas Co., 491 U.S. 1, 12, 13, 109 S. Ct. 2273, 2280, 2281, 105 L. Ed. 1 (1989).

Independent Petrochemical, 944 F.2d at 947.

Contrary to the insurers' assertions, the District of Columbia Circuit clearly believed this Court's decision in Union Gas Co. was applicable and relied upon it to reject the assertion that CERCLA response costs were merely equitable relief as a matter of congressional intent and federal law. Indeed, the District of Columbia and Eighth Circuits have reached contrary conclusions on the issue before this Court, with respect to the same state, Missouri. Compare Independent Petrochemical Corp., 944 F.2d at 944-47 with Continental Ins. v. Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977, 987-90 (8th Cir.) (en banc), cert.

denied sub nom. Missouri v. Continental Insurance Cos., 488 U.S. 821 (1988). The District of Columbia Circuit went on to cite numerous other federal decisions construing CERCLA response claims to constitute damages, including its own previous decision in Ohio v. United States Dep't. of Interior, 880 F.2d 432, 459 (D.C. Cir. 1989) (cost of restoration is proper measure of damages in natural resource recovery actions pursuant to § 9607(a)(4)(C)). Id.

The insurers assert that Union Gas Co. has no applicability since the issue involved Eleventh Amendment immunity. In assessing the extent of the immunity, however, this Court determined that the issue involved the assessment of damages against the State as opposed to mere equitable relief. The insurers can not dispute that the manner in which this Court characterized response costs in Union Gas Co. was totally contrary to how the Wisconsin Supreme Court construed response costs in the present case for the identical federal statute.

The insurers rely upon Exxon Corp. v. Hunt, 475 U.S. 355 (1986), a case they relied upon in their briefs to the Wisconsin Supreme Court. The Wisconsin Supreme Court did not rely upon Exxon Corp., apparently recognizing what the insurers ignore. Exxon Corp. involved a pre-emption issue concerning the expenditure of federal monies pursuant to Superfund. Exxon Corp., 475 U.S. at 360-61. The issue was whether New Jersey, pursuant to its own spill compensation and control act, could tax the petitioners for a separate state fund to clean up hazardous waste sites also covered by Superfund. Id. Whether the Superfund monies may be used to compensate third parties for injuries is irrelevant as to whether response costs are damages which a third party is required to pay to clean up a hazardous site.

This Court's recent decision in Key Tronic Corp. v. United States, ___ U.S. ___, 114 S. Ct. 1960, 128 L. Ed. 2d

797 (June 6, 1994), demonstrates that response costs are treated as damages by allowing contribution claims between PRPs for those costs other than attorneys fees. An implied right of contribution makes no sense unless the case involves joint and several liability for damages, rather than equitable relief. The insurers have no response to the fact that this Court has consistently treated response costs as damages whenever it has been required to construe CERCLA.

The fallacy of the insurers' argument is further shown by what is included in the measure of damages for natural resource recoveries pursuant to § 9607(a)(4)(C). The Wisconsin Supreme Court conceded that these did constitute damages pursuant to its narrow definition. (A.Ap. at 137.) The insurers also agree that natural resource recoveries are damages. (General Casualty Brief at 11.) The insurers argue that response costs really are not a part of § 9607(a)(4)(C); this is untrue. The measure of recovery pursuant to § 9607(a)(4)(C), which everyone agrees is damages, however narrowly defined by the Wisconsin Supreme Court, includes precisely the same costs, for the same activities, administered in the same manner. 43 CFR § 11.80(b), 59 Fed. Reg. at 14283. This was the linchpin of the court's decision in Ohio v. United States Dep't of Interior, 880 F.2d at 441-59. The District of Columbia Circuit recognized as much when it relied on the Ohio case in holding response costs were damages in Independent Petrochemical, 944 F.2d at 947.

It makes no sense to include as "damages" costs of restoring natural resources which are identical to response costs but declare, as a matter of federal law, response costs are not "damages." In essence, the insurers are asserting that the same dollars to do the same thing are "equitable dollars" if expended pursuant to § 9607(a)(4)(A) but "damages dollars" if expended pursuant to § 9607 (a)(4)(C). Certainly, the dollars themselves carry no such label, and subsections of § 9607(a)(4) carry no such label either.

It is also critical to note that while the insurers adamantly claim there is no issue of federal law in the present case, in General Casualty's argument that the Wisconsin Supreme Court correctly construed response costs, pages 10-17 of General Casualty's brief in opposition, it repeatedly relies upon Continental Ins. Co., 810 F.2d at 749. Continental Ins. Co. resolved the same question as the present case, and was one of the two cases from other jurisdictions cited by the Wisconsin Supreme Court. (A.Ap. at 133-39.) Continental Ins. Co. is cited by General Casualty as authoritative for the proposition of federal law:

> Federal courts have consistently held response costs actions under CERCLA are equitable actions invoking injunctive and restitutionary relief and do not constitute actions for legal damages.

General Casualty Brief at 12 (footnote omitted). The insurer's reliance on this case as an authoritative interpretation of federal law establishes without question that the real issue here is an interpretation of federal law.

The issue in the present case is the proper construction of § 9607(a)(4)(A) of the United States Code, not the interpretation of state contract and insurance law. This Court and numerous federal circuit courts have construed and treated this relief to constitute a damages remedy, as opposed to a purely equitable remedy. This is a question of federal law, a question which has divided the circuits, even as to the same state of Missouri, and a question this Court needs to resolve.

II. A PROPER CONSTRUCTION OF § 9607(a)(4)(A) IS A SUBSTANTIAL NATIONAL CONCERN WHICH IMPACTS UPON THE EFFICACY OF CERCLA BECAUSE OF THE NECESSITY OF A UNIFORM INTERPRETATION OF THIS FEDERAL STATUTE.

The substantial importance of this issue is not only shown by the significant number of conflicting federal circuit court decisions, but also by the mere number and breadth of the organizations that filed amicus briefs before the Wisconsin Supreme Court in this case. Approximately nine amicus briefs, representing 112 parties and organizations, were filed on behalf of organizations as diverse as the Sierra Club, the National Association of Chemical Recyclers, the American Petroleum Institute, the Wisconsin Department of Natural Resources and the Wisconsin Attorney General, as well as numerous state and national businesses.

CERCLA is a federal statute. The construction of relief pursuant to various subsections of a federal statute is a question of federal law. The uniform construction of a federal law is a predominant consideration in the adoption of a federal law. Contrary to the insurers' assertions, petitioners are not seeking to interfere with state insurance contract law. The Wisconsin Supreme Court relied, as have other federal circuit courts, on a construction of CERCLA, based upon its interpretation of congressional intent, that response costs are solely equitable relief. Petitioners seek review of that construction; petitioners request this Court to determine whether its construction of CERCLA's statutory language and congressional intent agrees with that of the Wisconsin Supreme Court, or that of the District of Columbia Circuit.

The substantial consequences of this decision are not denied by the insurers. Based upon different constructions of response costs pursuant to § 9607(a)(4)(A), insurance

coverage may or may not exist. Thus, depending upon the state or federal jurisdiction where the case is filed, the result may be different, totally destroying any uniformity in CERCLA's application and destroying its effectiveness in promoting the cleanup of hazardous waste sites. The principal purpose of CERCLA was to establish a uniform federal solution to a national crisis which states and localities were unable to solve. Union Gas Co., 491 U.S. at 20-21 (Brennan, J., plurality op.). ("And often those solutions, to be satisfactory, must include a cause of action for money damages.") The decision of the Wisconsin Supreme Court which misconstrues CERCLA defeats that purpose. Accordingly certiorari should be granted to establish a consistent, uniform interpretation of response costs as damages under § 9607 (a)(4)(A).

CONCLUSION

For the reasons set forth, joint petitioners respectfully request their joint petition for certiorari to the Wisconsin Supreme Court be granted.

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